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In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUISIANA DAIRY STABILIZATION BOARD,
Appellant

VERSUS

DAIRY FRESH CORPORATION AND
DAIRY FRESH ICE CREAM CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the Commerce Clause forbid a state to adopt an evenhanded antitrust law that applies equally to in-state and out-of-state dairy processors?

2. Does a state impose an unreasonable burden on interstate commerce by assessing the same nominal fee on all in-state and out-of-state processors whose dairy products are resold in the state, where such assessment is used solely to defray the actual expenses of enforcing valid state antitrust laws?

3. Does a federal court commit error by invalidating an entire state antitrust program on the sole ground that the program's assessment fee provision is unconstitutional?

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OPINIONS BELOW

The Fifth Circuit's opinion is reported at 631 F. 2d 67 (1980), and is reprinted in Appendix A. Its denial of rehearing on February 18, 1981, is reprinted in Appendix C. The district court's principal opinion is reported at 476 F. Supp. 416 (1979), and is reprinted in Appendix B. Its opinion denying plaintiff's motion for a partial new trial, rendered January 7, 1980, is also reprinted in Appendix B.

GROUNDS FOR JURISDICTION

This is an appeal from a ruling by a panel of the Fifth Circuit Court of Appeals. That ruling affirmed the judgment of the U.S. District Court for the Middle District of Louisiana, which invalidated a Louisiana antitrust law as applied to out-of-state dairy processors. Federal jurisdiction was based on 28 U.S.C. § 1331.

The Fifth Circuit released its opinion on November 21, 1980, and denied Appellant's petition for rehearing on February 18, 1981. The Notice of Appeal was filed with the Fifth Circuit Court of Appeals on April 23, 1981. This Court has jurisdiction over this appeal under 28 U.S.C. § 1254(2).

STATUTES INVOLVED

The provisions of the Louisiana Dairy Stabilization Law invalidated by the district court below, La. Rev. Stat. §§ 40:931.10, :931.13, are reprinted verbatim in Appendix E. A post trial amendment to La. Rev. Stat. § 40:931.13 is reprinted verbatim in Appendix F. Printed copies of the entire Dairy Stabilization Law, as amended, and the Dairy Stabilization Board's regulations have been separately lodged with the Clerk of this Court.

STATEMENT OF THE CASE

A. Introduction

Appellant, the Louisiana Dairy Stabilization Board (hereinafter, the Board) is an antitrust subagency of the Louisiana Department of Agriculture. The Board was created by the Louisiana Dairy Stabilization Law, La. Rev. Stat. §§ 40:931.1 to 931.19, and its sole function is antitrust regulation. It has no authority to set milk prices or to regulate the milk supply; it can only investigate and eliminate anticompetitive trade practices in the industry.

The legislative history of the statute reflects that Louisiana's approach to milk regulation underwent a complete turnaround in the years 1974-1976. Prior to 1974, the old Louisiana Milk Commission had statutory powers to set the price of milk at the wholesale and retail levels, and its ill-fated attempts to impose price controls and exclude out-of-state milk were invalidated in the courts. *See Schwegmann Bros. Giant Super*

Markets v. Louisiana Milk Commission, 365 F.Supp. 1144 (M.D. La. 1973), *aff'd,* 416 U.S. 922 (1974); *Schwegmann Bros. Giant Super Markets v. Edwards,* 323 So. 2d 810 (La. Ct. App. 1975), *writ. denied,* 326 So.2d 503 (La. 1976). Furthermore in March 1973, there was much public sentiment against the Commission's decision to raise retail prices by 6 cents per gallon. In response to these situations, Governor Edwards formed the Milk Study Committee to consider the entire question of milk regulation and report its findings and recommendations to the 1974 Legislature. The Committee held 19 meetings and 4 public hearings throughout the state. The Majority Report of the Committee recommended no fundamental change in the power to set prices, even though it did recommend legislation to correct certain deficiencies. However, the Report of Exceptions (hereinafter, Minority Report) disagreed sharply with the philosophy of price fixing and rejected the concept of legislating " the same old package tied with a new ribbon." *See* Appendix F. The Minority Report stated, "In our opinion State pricing discourages competition and promotes unduly high prices especially at the retail level." *Id.* Suggesting instead a free market strategy, the Minority Report stated, "It is essential that Louisiana enact regulations to insure that open and fair competition takes place in the milk industry." *Id.* To that end it suggested new legislation, tailored along the lines of the Robinson-Patman and other federal antitrust acts, to curb unfair trade practices and monopolization. The Legislature eventually followed this Minority

Report recommendation. In 1974, it abolished the Louisiana Milk Commission, eliminated retail price controls, and created a new Dairy Stabilization Board. 1974 La. Acts, No. 31. In 1976, House Bill 1511 proposed antitrust powers for the Dairy Stabilization Board, and the possibility of granting the Board authority to set price levels was considered during committee deliberations. Appearing before the Senate Agriculture Committee, the Bill's author, Representative Carson, stated it was the "unanimous feeling" that all price fixing should end. Minutes of Hearing, Senate Committee on Agriculture, July 22, 1976, at 4. When asked why the new Board should be given the power to enforce the laws against disruptive trade practices, Mr. Carson's reply, as reflected in the Minutes, was that orginally his bill

> would have put enforcement within the Department of Agriculture, but the [House Agriculture] Committee did not want it there. They felt that enforcement of unfair trade practices could not be properly accomplished in that department, and wanted a separate board for enforcement. *Id.* at 4.

Mr. Carson then accepted an amendment offered by Senators Campbell and Barham, confining the Board's authority to the control of disruptive and monopolistic trade practices and denying to it all power to fix prices at the wholesale and retail levels. *Id.* The final outcome emerged in 1976 La. Acts, No. 695 (codified as La. Rev. Stat. § 40:931.5), which faithfully reproduced the 1974 Minority Report recommendations and the 1976 Hearings:

> Sales of all dairy products covered by this Subpart by retailers, distributors, and processors shall not be subject to price regulation; in no event shall the

> Dairy Stabilization Board have power or authority to regulate or establish wholesale or retail prices; provided that any such sales shall be subject to the condition of open market competition in compliance with the disruptive practices provisions of this Subpart.

The exclusively antitrust function of the Board was explicity grounded in specific legislative findings which stated,

> The failure to provide effective regulation of the Louisiana dairy industry will lead to a resumption of unfair methods of competition that once existed in the Louisiana dairy industry, ... and will tend to create a monopoly in the processing and distribution of milk and dairy products.

La. Rev. Stat. § 40:931.1(10). *See id.* at § 40: 931.1(6), (14); Symposium, *The Work of the Louisiana Legislature for the 1976 Regular Session*, 37 La. L. Rev. 89, 146 (1976).

Accordingly, the new law evenhandedly provided that any in-state or out-of-state processor who sells dairy products for resale in Louisiana must not engage in disruptive trade practices, *id* at § 931.8, must be licensed and registered with the Board, *id.* at § 931.10, must grant reasonable access to its records, *id.* at § 931.11, and pay a nominal assessment of 3 cents per hundredweight into a revolving fund to support the administrative expenses of the antitrust program. *Id.* at § 931.13. Since this fund may not exceed $150, 000, the Board must suspend assessments to prevent any excess accumulation. *Id.* at § 931.14; Stipulations 1, 2 (Record at 216).

B. The Proceedings Below

On March 4, 1976, Appellee Dairy Fresh, Inc., whose principal office is in Hattiesburg, Mississippi, was licensed by the Board as a processor of fluid milk. It sells approximately 15 per cent of its production in Louisiana, and these sales form 12 percent of the total milk market for the New Orleans metropolitan area . (Transcript of Trial [Tr] at 23, 57). On June4, 1976, Appellee Dairy Fresh Ice Cream Corporation, whose principal office is in Greensboro, Alabama, was licensed as a processor of frozen desserts. Approximately 35 per cent of its production is sold in Louisiana (Tr. at 23). Appellees, which have a common President, Chairman of the Board, and a majority of stockholders (Tr. at 21-22), refused to pay the legally required assessment on these sales. They were the only processors, out of the approximately 40 in-state and 40 out-of-state processors serving the Louisiana market, that refused to pay this nominal assessment. After several unsuccessful collection attempts, the Board filed a complaint in an administrative proceeding against Appellees. At a hearing on October 25, 1977, Appellees requested that the Board withdraw their licenses. *See* Pre-trial Order, par. 6 (g) - (j) (Record at 107).

The Board then instituted the present action, in U.S. District Court for the Middle District of Louisiana, seeking a declaratory judgment solely as to the constitutionality of its assessment authority over Dairy Fresh and Dairy Fresh Ice

Cream. The latter counterclaimed for the declaratory and injunctive relief, and the case was tried before Judge E. Gordon West on May 25, 1979. He found that the assessment was "not a tax used by the State to generate revenue," but was "a valid assessment imposed by the state to effectuate a valid exercise of its police powers." *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 476 F.Supp. 416, 419 (M.D. La. 1979) (Appendix B). He further found that the Act did not "differentiate" and made "no distinction" between in-state and out-of-state processors. *Id.* at 418, 419. He made no finding that the law was in any way discriminatory or protectionist. Nevertheless, he concluded that the assessment placed an unconstitutional burden on interstate commerce because an alternative method might be available:

> While the three cent per hundredweight is relatively small, the same benefit to the State of Louisiana could be derived by directing assessments against in-state retailers rather than out-of-state processors, and thus avoid the direct burden, however small, on interstate commerce.

Id. at 420. The district court held that the commerce clause prohibited the application of the Dairy Stabilization Law "and all of its provisions, and the regulations" thereunder to any processors located outside of Louisiana, and it enjoined the Board from enforcing the key statutory provisions against Appellees. 476 F.Supp. at 420; Appendix B (Judgment).

On appeal to the Fifth Circuit Court of Appeals, no issue of discrimination was raised by either party. Yet, a panel of that court summarily concluded that the law was discriminatory, hostile to out-of-state interests, and protectionist. The court claimed that the purpose was to restrict access of out-of-state suppliers to local markets " in order to protect local economic interests." *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 631 F. 2d 67, 69 (5th Cir. 1980) (Appendix A). It then concluded that Louisiana has no power "to project its economic regulations — at least insofar as the purpose is to protect local economic interests — to production, processing, and sale of dairy products at places without the state." *Id.* The court did not attempt to base its finding of protectionist purpose on legislative history, evidence in the record, or the trial court's findings. Instead, the Fifth Circuit panel, on its own motion, applied the *per se* rule of invalidity, which this court has reserved for discriminatory and protectionist statutes, and invalidated the law under the commerce clause.

SUMMARY OF THE ARGUMENT

The registration and assessment provisions of Louisiana's evenhanded antitrust law do not violate the commerce clause. The minimal burden of these provisions on commerce is greatly outweighed by the public benefit in a marketplace free of monopoly.

Without the slightest basis in fact, let alone in the record, the Fifth Circuit panel conjectured that the aim of the law was protectionist, discriminatory and hostile toward out-of-state processors. The panel contradicted the district court's express findings that the law is a valid exercise of the police power and it applies evenhandedly to all in-state and out-of-state processors. Using a totally incorrect legal standard — the *per se* rule of invalidity reserved for discriminatory statutes — the panel enjoined all enforcement of Louisiana's evenhanded antitrust law against out-of-state processors without attempting to weigh or balance the significant benefits of this antitrust regulation.

The Court should have applied a balancing approach, weighing the state's vital interests in providing the important benefits of antitrust regulation against the slight burden of a nominal assessment used solely to defray administrative expenses. When this, the appropriate constitutional test, is applied, the commerce clause balance tips decisively in favor of Louisiana's antitrust law.

Furthermore, the only facet of the law found unconstitutional by the district court was the application of the assessment provision to out-of-state processors. Yet that court, ignoring the severability of the assessment from the rest of the antitrust provisions, invalidated an entire statutory and administrative program on the basis of a single provision. Moreover, the alleged flaw has been cured by legislative amendment which now permits collection of assessments from in-state retailers. Yet, the district court's overbroad decree affirmed by the Court of Appeals, has paralyzed all antitrust enforcement against the out-of-state processor.

ARGUMENT

I. LOUISIANA'S DAIRY STABILIZATION LAW IS A VALID STATE ANTITRUST LAW WHICH HAS NO DISCRIMINATORY IMPACT ON INTERSTATE COMMERCE

A. There Is No Basis Whatsoever For The Fifth Circuit's Conclusion That The Dairy Stabilization Law Discriminates Against Interstate Commerce

The record in this case is completely barren of any evidence to support the Fifth Circuit's bald assertion that Louisiana's Dairy Stabilization Law has the purpose of protecting local economic interests at the expense of interstate commerce.[1] Such a discriminatory purpose certainly does not appear on the face of the statute. The Dairy Stabilization Law requires that *all* processors (both in-state and out-of-state) which sell milk products for resale in Louisiana register with the Board and pay a nominal, compensatory assessment. Furthermore, Appellees have neither alleged nor argued, let alone introduced any evidence to show, that the Act has discriminatory effects. Indeed, it is undisputed the precisely the same registration procedure

1. The Fifth Circuit panel's imaginative approach is demonstrated by the following *non sequitur* from its opinion:

> The Board essentially contends that the burden on interstate commerce is justified by the legitimate local purpose of *preventing local economic disruption and the development of monopolies affecting the local market;* whereas the Supreme Court has held that the Commerce Clause prevents a state from burdening interstate commerce for the purpose specified, *i.e. to restrict economic competition from without the state.*

631 F.2d at 70 (emphasis added). Only by a process of guilt by historical association with earlier "Louisiana milk cases" can the panel have equated for the two italicized phrases.

and exactly the same assessment rate are applied to any and all processors, whether they are located in Louisiana or out-of-state. For this reason, the district court specifically found, "The Act does not differentiate between in-state and out-of-state processors." 476 F.Supp. at 418-19 (findings of fact nos. 5 and 7, conclusion of law no. 3).

In fact, the only discrimination present in this case has been created by the Fifth Circuit's ruling. All of the approximately 40 out-of-state and 40 in-state processors dealing in the Louisiana dairy market have registered and paid the minimal assessment, except Appellees. By refusing to register, they are the ones who gain an unfair advantage over their competitors, since they completely escape state antitrust investigations and enforcement proceedings, and they avoid paying their fair share of the administrative costs of the antitrust regulations which ensure fair market competition for everyone. The Fifth Circuit seriously misinterpreted the precedents of this Court and those of other circuits, by allowing Appellees to employ the commerce clause as a sword, to justify their refusal to register, rather than as a shield, to protect them from discrimination. "While the commerce clause bars discrimination against interstate commerce, it cannot be invoked to require discrimination in favor of it." *American Airlines, Inc. v. Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir. 1977).

B. The Fifth Circuit Employed the Wrong Legal Standard To Evaluate Louisiana's Evenhanded Antitrust Law and Regulations

Instead of weighing the obvious benefits of the Dairy Stabilization Law against the potential burdens it might place upon interstate commerce, as required by the well-established commerce clause jurisprudence of this Court, the Fifth Circuit panel erroneously chose the *per se* rule of invalidity articulated in *Philadelphia v. New Jersey*, 437 U.S. 617, 623-624 (1978); *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U. S. 922 (1974); and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S. 511 (1935). Yet, these and subsequent cases have made it exceedingly clear that this automatic rule of invalidity is applicable only where a state discriminates against interstate commerce by denying access to that state's market or by fixing prices on extraterritorial sales. As demonstrated above, however, the Dairy Stabilization Law and its regulations do not exclude any products from Louisiana, do not interfere with the regulatory power of sister states, and do not fix prices. They do not discriminate against interstate commerce in purpose or in effect. Instead, they are designed to enhance commerce and to encourage free and open competition, and they are applied evenhandedly, to all in-state and out-of-state processors.

A federal appellate court simply has no authority to make guesses about legislative motive, particularly where that court overrides the findings of the trial court and ignores the facial and practical evenhandedness of a state statute. *See Minnesota v. Clover Leaf Creamery, Co.*, 101 S.Ct. 715 (1981) (denying this power even to state court).

By deviating from the firm precedents of this Court and from the record in the case before it, the Fifth Circuit failed to show the sensitivity which is required when a federal court is asked to rule on the constitutionality of a state statutory program.[2] The commerce clause test in such a case "is not a mechanical one," like that employed by the court below; instead it "involves a delicate accomodation of disparate interests." *National Farmers Org'n v. Commissioner of Agriculture*, 496 F. Supp. 509, 512, 513 (D. Conn. 1980). *See also Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978); *Parker v. Brown*, 317 U.S. 341, 362 (1943).

II. LOUISIANA'S DAIRY STABILIZATION LAW DOES NOT UNDULY BURDEN INTERSTATE COMMERCE, BECAUSE ITS SUBSTANTIAL STATE BENEFITS FAR OUTWEIGH ITS MINIMAL EFFECTS ON INTERSTATE COMMERCE

A. The Correct Legal Standard Requires a Weighing of Benefits and Burdens

This Court has consistently employed a balancing test when a neutral statute, such as the Louisiana Dairy Stabilization Law, is challenged under the commerce clause. At least since *Pike v. Bruce Church*, 397 U.S. 137 (1970), that test has been stated as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is

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2. Appellant noted the Fifth Circuit's deviation from the precedents and record in its Motion for Rehearing, which was denied without opinion by that court. *See* Appendix C.

> clearly excessive in relation to putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of *degree*. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (emphasis added). *Accord, Minnesota v. Clover Leaf Creamery Co.*, 101 S.Ct. 715, 729 (1981); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). *See also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443, 448 (1960). When this, the appropriate test, is properly applied, it becomes clear that the Dairy Stabilization Law is a constitutionally valid exercise of Louisiana's police power. This Act effectuates the substantial and "legitimate local public interest" in antitrust regulation by the least burdensome means available — state investigation and prevention of anticompetitive practices. Moreover, the *Pike* requirement that "the effects on interstate commerce" be "only incidental" is clearly met. Dairy processors are merely required to register, make business records available for reasonable inspections, and pay an evenhanded, compensatory assessment on dairy products that enter the Louisiana market. Indeed, the design and effect of the Act are to enhance and liberate commerce and to promote free competition. In short, the Louisiana Dairy Stabilization Law passes the *Pike* test in all respects with flying colors.

B. Louisiana Has A Vital State Interest In Antitrust Regulation.

The substantial interest of the states in antitrust regulation is well-established. *See, e.g., Exxon Corp. v. Governor of Maryland, supra* (rejecting due process, commerce clause, and preemption attacks on state law requiring interstate oil companies to divest themselves of retail gasoline stations); *State v. Sterling Theatres Co.*, 64 Wash. 2d 761, 394 P.2d 226 (1964) (rejecting commerce clause attack on state antitrust action against out-of-state distributors); *State v. Allied Chemical & Dye Corp.*, 9 Wis.2d 290, 101 N.W. 2d 133 (1960) (same). Currently, 46 states have antitrust laws. *See* Fellmeth & Papageorge, *A Treatise on State Antitrust Law and Enforcement* 19-20, and Appendix (BNA 1978). Indeed, some 22 states include prohibitions against restraint of trade and monopolization in their constitutions. *See* Sieker, *The Role of the States in Antitrust Law Enforcement - Some Views and Observations*, 39 Tex. L. Rev. 873, 878 (1961). *See also* Rubin, *Rethinking State Antitrust Enforcement*, 26 U. Fla. L. Rev. 653, 657 (1974) (noting that 153 separate state statutes were antitrust in nature as of 1965).[3]

Louisiana's Dairy Stabilization Law is one such state antitrust law. It was premised upon careful study and specific legislative findings that state antitrust regulatory activity is needed to ensure free competition in the dairy industry. Thus, the

3. It is also well-established that the federal antitrust laws do not preempt complementary state statutes. *See, e.g., Exxon Corporation v. Governor of Maryland, supra,* at 129-34; *Standard Oil Co. v. Tennessee,* 217 U.S. 413 (1910); *State v. Amoco Oil Co.,* 97 Wisc. 2d 226, 293 N.W. 2d 487 (1980); *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission,* 365 F. Supp 1144 (M.D. La. 1973) (holding Louisiana's antitrust provisions not preempted by Robinson-Patman Act), *aff'd,* 416 US. 922 (1974).

Louisiana Legislature noted that "the dairy industry is particularly susceptible" to disruptive trade practices, La. Rev. Stat. § 40:931.1(6), and that failure to provide antitrust regulation "will lead to a resumption of unfair methods of competition that once existed in the Louisiana dairy industry." *Id.* at § 40:931.1(10). Thus, "monopoly, disruptive trade practices, and unfair methods competition should be prohibited in the Louisiana dairy industry." *Id.* at § 40:931.1(14). The Legislature further specified that the appropriate method for achieving this vital state interest was through a specialized board "empowered and directed to prevent persons, partnerships and corporations from using unfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices in the sale of milk and milk products." *Id.* at § 40:931.8 (B).[4] In order to prevent these outlawed anticompetitive activities,[5] processors and distributors who sell dairy products for resale in the Louisiana market are required to register with the Board and to disclose certain limited information relating to their trade practices, so the Board can detect possible antitrust violations. *See* La. Rev. Stat. § 40:931.11;

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4. The Board was, however, explicitly denied any power to regulate prices. *See* La. Rev. Stat.§§ 40:931.5 (quoted on pages 4-5 *supra*); :931.17. *See generally* Symposium, *supra*, at 146.

5. The Board has promulgated regulations that prohibit price discrimination and sales below cost which substantially "lessen competition or tend to create a monopoly," Regulations 13.1 .2; 13.1.10, and it has adopted the Robinson-Patman Act provisions *verbatim*.

Regulation 12:11. These detailed legislative findings as to the danger of unfair trade practices, and the Legislature's reasonable choice of a method for combating them, are entitled to substantial respect and deference by a federal court. *See Minnesota v. Clover Leaf Creamery Co.*, 101 S.Ct. 715, 723-26, 728-29 (1981); *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 121, 124-25 (1978).

Moreover, the approach to antitrust regulation chosen by Louisiana is not a unique one. It comports with the progressive recommendations of various commentators, that states should place antitrust enforcement policy in the hands of experts and provide them with adequate "pre-complaint" investigatory and "visitorial" powers. *See, e.g.*, B. Burrus, Investigation and Discovery in State Antitrust Law 6-7, 35 (Mich. Leg. Pub. 1967) (noting with approval that 21 states have granted antitrust agencies such "visitorial powers" over records, correspondence and business documents); Rahl, *Toward A Worthwhile State Antitrust Policy*, 39 Tex.L.Rev. 753, 764 (1961). Yet, despite the Louisiana Legislature's attempt to employ this modern, relatively common approach to antitrust regulation, while eliminating all prior price-fixing power, the Fifth Circuit has condemned it because of the perceived sins of the now-disbanded Milk Commission.

Like Maryland's oil company divestiture program, upheld by this Court in *Exxon*, the current Louisiana provisions and regulations are designed to prevent preferential treatment in the

sale of a product (be it petroleum or milk) and to promote free and open competition. These, of course, are the basic purposes both of the commerce clause and of all federal and state antitrust laws. The courts below, by failing to acknowledge how weighty these substantial state interests are, have cast doubt upon the constitutionality of the vast collection of state antitrust laws, with comparable visitorial and enforcement powers. *See, e.g.*, Kan. Stat. Ann. §§ 50-103, 50-105 (Weeks 1976); Tex. Stat. Ann. §§ 1302-5.01 to 1302-5.06 (Vernon 1980).[6]

C. The Effect Of Louisiana's Antitrust Law On Interstate Commerce is Minimal

The record contains no evidence that registration is, in any way, expensive or burdensome. There was no showing, nor could there be, of delay in the obtaining of licenses, partiality in granting licenses, expense in disclosing the required information, or exclusion of anyone from the Louisiana market. As noted above, all of the more than 80 domestic and foreign dairy processors, except Appellees, are currently registered and licensed. Indeed, even Dairy Fresh and Dairy Fresh Ice Cream were

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6. This Court has repeatedly reversed lower courts which incorrectly balanced the interests involved in a dormant commerce clause case. *See, e.g., Minnesota v. Clover Leaf Creamery Co., supra; Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129, 136-139 (1968).

given licenses, which they later unilaterally returned, shortly before the initiation of this suit.

The reach of the Dairy Stabilization Law is no broader than necessary to effectuate its purpose of detecting and deterring anti-competitive activities that have a direct impact in the Louisiana market. Thus, out-of-state corporations whose activities have no impacts in Louisiana are completely excluded from its coverage and therefore are not burdened by it in any way. Only those out-of-state processors which sell dairy products for resale in Louisiana are required to register with the Board and to pay the nominal, compensatory assessment on those products that enter the Louisiana market. Appellees seek to escape their responsibilities under this Act, despite the fact that they are doing business in Louisiana (Appendix B-15), are selling in excess of $300,000 worth of dairy products per month to Louisiana retailers for resale in Louisiana, and are selling between 15 and 35 percent of their production to these Louisiana retailers (Tr. at 23).

Those in-state and out-of-state processors which have registered—because of their impact on the Louisiana dairy market — are assessed at the nominal rate of 3 cents per hundredweight of dairy products sold for resale in Louisiana. This nominal fee certainly cannot be considered burdensome; even the district court described it as "relatively small." 476 F.Supp.

at 420. [7] Moreover, this assessment is free of each and every vice which decisions of this Court have deemed to be impermissible burdens on interstate commerce. Thus, it is compensatory, fairly apportioned, and reasonable. *See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972). Like the *Evansville* user fee charged to all commercial airline passengers, the assessment in the instant case is used solely to fund activities which enhance commerce. *See also American Airlines, Inc. v. Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir. 1977). In addition, the assessment here is actually lower and better apportioned than the $1.00 flat fee in *Evansville*.

Since all processors are assessed at exactly the same rate, they can easily pass on the assessment charge as part of the price to their buyers—Louisiana retail stores. *See* footnote 7 *supra* and Section III *infra*. By contrast, if the Board were to assess only retailers, as the district court suggested, 476 F. Supp

7. The minimal cost of 3 cents per hundredweight is shown by comparing it to the wholesale price of milk in the New Orleans area, which was $16.28 per hundredweight on January 27, 1978 (the date of filing the complaint), $20.70 on November 21, 1980 (the date of the Fifth Circuit's opinion), and $20.93 on May 1, 1981. In short, the assessment represents less then 2/10ths of one percent of the wholesale price of milk products. Viewed from the retail perspective, it would add less than a third of a cent to the retail price of a gallon of milk. Milk sold in the New Orleans area for $1.49 to $1.73 a gallon on January 27, 1978, $1.77 to $2.54 per gallon on November 21, 1980, and $1.99 to $2.66 per gallon on May 1, 1981. International Assn. of Milk Control Agencies, Supermarket Milk Price Surveys (monthly summaries).

at 420, the administrative costs (and therefore the costs to consumers) would be enormous. This is because there are many thousands of retailers but only about 80 processors serving the Louisiana market. Moreover, the state's interest in antitrust investigation of processors and distributors would not be adequately served simply by assessing retailers. That vital interest requires licensing and registration of processors — a minimal burden at most.

D. The Commerce Clause Balance Tips Decidedly In Favor Of Louisiana's Antitrust Law

The Dairy Stabilization Law's registration and "visitorial" inspection approach is much less burdensome than any of the alternative methods of pursuing the vital state interest in antitrust regulation. Yet, when challenged under the commerce clause, these other, more burdensome methods have all received the constitutional blessing of this Court, other federal courts, and state Supreme Courts.

Thus, this Court, by a 7-1 margin, recently upheld a Maryland antitrust law which was substantially more burdensome than Louisiana's law. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Maryland chose to deter monopoly practices by requiring all out-of-state petroleum processors to divest themselves completely of profitable retail outlets; while Louisiana has pursued the same antitrust interest by requiring dairy processors simply to register and pay a nominal, com-

pensatory assessment. *Tuscan Farms, Inc. v. Barber*, 45 N.Y. 2d 215, 380 N.E. 2d 179, 408 N.Y.S. 2d 348 (1978), *appeal dismissed for want of a substantial federal question*, 439 U.S. 1040 (1978), upheld a state market regulation that was even more exclusionary than Maryland's divestiture requirement. The *Tuscan* court ruled that New York did *not* violate the commerce clause by denying a license to an out-of-state milk processor to sell milk to New York retailers, in order to protect " the existing balanced milk distribution structure." *Id.*, 45 N.Y. 2d at 225, 380 N.E. 2d at 185 , 408 N.Y.S. 2d at 354. Louisiana has not, however, denied Dairy Fresh a license to sell or excluded it from the market; it seeks only to apply its reasonable antitrust regulations.

Furthermore, this Court has unanimously ruled that the commerce clause does not bar California from applying its restraint-of-trade statute to an employment contract between a California resident and a New York corporation whose business activity (dealing in securities) and employment contracts were interstate in nature. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973). *See also South Dakota ex rel. Meierhenry v. Speigel, Inc.*, 277 N.W. 2d 298 (S.D. 1979) (upholding application of South Dakota's usury law to Delaware mail-order corporation whose sales and extensions of credit to South Dakota residents took place exclusively in Illinois),

appeal dismissed, 444 U.S. 804 (1979).[8] Unlike these cases, where interstate contracts were rewritten or invalidated as a result of state law, the instant case involves only registration by and Board investigation of two out-of-state corporations. These minimal requirements of the Dairy Stabilization Law are more akin to, though still less burdensome than, state blue sky laws. *See Rousseff v. Dean Witter & Co., Inc.*, 453 F.Supp 774 (N.D. Ind. 1978) (applying Indiana securities law to out-of-state broker-dealer for transaction involving the latter's Florida and New York employees). *See also Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950).

Finally, the commerce clause poses no barrier to state-initiated antitrust suits, even where corporations comparable to Dairy Fresh are defendants. *See State v. Allied Chemical & Dye Corp., supra* (out-of-state sellers of farm products); *State v. Sterling Theatres Co., supra* (out-of-state film distributors). Indeed, constitutional attacks upon Louisiana's own disruptive trade legislation have been rejected by the courts. *See Schwegmann Bros. Giant Super Markets v. McCroy*, 112 So.2d 606 (La. 1959), *appeal dismissed*, 361 U.S. 114 (1959), and

8. Four Federal Courts of Appeals have also upheld the application of state usury laws to out-of-state mail order businesses which were purely interstate in nature. *See Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); Aldens, *Inc. v. La Follette*, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977); *Aldens, Inc. v. Miller, 610* F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *Aldens, Inc. v. Ryan*, 571 F. 2d 1159 (10th Cir.), *cert.denied*, 439 U.S. 860 (1978).

private suits seeking treble damages under this legislation have been sustained. *DeLaughter v. Borden Co.*, 431 F. 2d 1354 (5th Cir. 1970).

Thus, the registration, and accompanying assessment, which Dairy Fresh is seeking to avoid in this case is substantially less burdensome than the other methods of state antitrust regulation—mandatory prior divestiture, contract supervision and invalidation, massive blue sky disclosure, and expensive, intrusive state and private enforcement proceedings. Louisiana's registration program is, therefore, *a fortiori* constitutional.

Unlike the Fifth Circuit, the district court did not employ a *per se* rule of invalidity. However, the district court failed to recognize the weighty state interest in antitrust regulation and the minimal effect of Louisiana's regulation upon interstate commerce. It also wrongly concluded that less burdensome alternatives were available to the state. Thus, its constitutional balancing was incorrect and should have been reversed by the Fifth Circuit. *See* footnote 6 *supra*. If allowed to stand, the opinions below will be in serious conflict with the commerce clause precedents of this Court and other federal and state courts.

III. THE COURTS BELOW EXCEEDED THEIR AUTHORITY AS FEDERAL COURTS BY FORBIDDING ANY AND ALL APPLICATIONS OF THE DAIRY STABILIZATION LAW TO OUT-OF-STATE CORPORATIONS

The only flaw the district court found with the Dairy Stabilization Law and its regulations was the assessment procedure. This is clear from Conclusion of Law no. 3:

> While the three cent per hundredweight is relatively small, the same benefit to the state of Louisiana could be derived by directing assessments against in-state retailers rather than out-of-state processors, and thus avoid the direct burden, however small, on interstate commerce.

476 F.Supp. at 420. Appellants have argued, on pages 18-24 above, that this conclusion as to the non-discriminatory compensatory assessment is itself incorrect. However, even assuming arguendo that this "relatively small" assessment were too burdensome, this could not justify the district court's expansive declaratory and injunctive relief against any and all applications of the key provisions of the Dairy Stabilization Law or any of its regulations to Dairy Fresh and similarly situated out-of-state processors.[9] Thus a federal district court has invalidated a state's entire statutory and administrative antitrust pro-

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9. The district court declared that the commerce clause

> prohibits the application of the Louisiana Dairy Stabilization Law, La. R.S. 40:931.1, et seq., and *all* of its provisions, and the regulations promulgated pursuant thereto by the . . . Board to processors located outside the State of Louisiana in *all* cases where the dairy products or the frozen dessert products involved are processed, sold and delivered outside the State of Louisiana.

gram on the basis of but a single provision.[10] That court completely ignored the severability provision in section 3 of the Act. Severability would have allowed invalidation of the assessment provision, which simply provides the financing mechanism for the program, while retaining the crucial registration and enforcement provisions. Instead, the Board has effectively been shorn of all investigatory and enforcement power over monopolistic practices that directly affect the Louisiana market in any case in which these practices involve a party located outside of the state.[11]

Moreover, the flaw believed by the district court to be constitutionally fatal had been cured by the Louisiana Legislature. Under a 1980 Amendment to the Dairy Stabilization Law, assessments not paid by a processor may be collected from his buyer (an in-state distributor or retailer). 1980 La. Acts,

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Note 9 continued

Id. (emphasis added). The district court also permanently enjoined the enforcement of the key provisions of the Act. La. Rev. Stat. §§ 40:931.10, :931.13. *See* Appendix B.

10. The Fifth Circuit simply affirmed this overly broad judgment, without ever considering the chasm between the district court's ruling and its rationale, because the Fifth Circuit rested its ruling on discriminatory purpose - an issue that was never alleged or briefed. *See* Section I *supra*.

11. This is because the Board has investigatory power only over processors licensed under La. Rev. Stat. § 40:931.10, which was invalidated by the district court. *See id.* at § 40:931.11.

No. 331, *codified* at La. Rev. Stat. § 40:931.13 (D); [reprinted in Appendix F]; Regulation 12.9. *See Schwegmann Giant Super Markets and Delchamps v. Louisiana Dairy Stabilization Board, No. 237, 725, Division F* (19th Dist. La. Feb. 26, 1981) (upholding these amended provisions). Thus, an out-of-state processor like Dairy Fresh Corporation need not pay the assessment; it can, instead, be paid by his purchaser. Thus, from the processor's perspective, Louisiana's scheme is now functionally indentical to the dairy scheme upheld in *National Farmers Organization v. Commissioner of Agriculture*, 496 F. Supp. 509 (D. Conn. 1980), where the state charged no fee. Yet, the district court's opinion and judgment, affirmed by the Fifth Circuit, prevent any antitrust investigatory or enforcement activity against Dairy Fresh or other out-of-state processors, irrespective of the latter's detrimental impact upon Louisiana's dairy market.

CONCLUSION

Thus, the Louisiana Dairy Stabilization Law is not discriminatory in purpose or in effect. It should, therefore, be tested by the balancing test articulated in *Pike v. Bruce Church, supra*, and recently reaffirmed in *Minnesota v. Clover Leaf Creamery Co., supra.* When this is done, it becomes clear that the Act serves a vital state interest, imposes a minimal burden on interstate commerce, and regulates by the least burdensome means. It also becomes clear that the district court's judgment was much too broad given the constitutional flaw it claimed to find. Since the decisions below conflict with the well-established

precedents of this Court, other federal courts and state supreme courts, they should be reversed.

For these reasons, Appellants urge this Court to reverse and remand to the Fifth Circuit for reconsideration under the *Pike* and *Clover Leaf* balancing test and for reconsideration of the breadth of the district court's opinion and judgment in light of the 1980 amendments to the Dairy Stabilization Law. Alternatively, Appellants ask this Court to permit plenary consideration of the substantial issues raised by this appeal, with full briefing on the merits and oral argument.

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The assistance provided by Michael Magner is gratefully acknowledged.

CERTIFICATE OF SERVICE

I certify that I have served three copies of the foregoing Jurisdictional Statement on Michael Fontham and John Landis, Stone, Pigman, Walther, Wittmann & Hutchinson, 1000 Whitney Bank Building, New Orleans, Louisiana 70130, by personally delivering same to them, by hand, at their offices, on this _____day of May 1981.

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APPENDIX A

OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS

LOUISIANA DAIRY STABILIZATION BOARD,
Plaintiff-Appellant,

v.

DAIRY FRESH CORPORATION and
Dairy Fresh Ice Cream Corporation,
Defendants-Appellees.

No. 80-3112
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

Nov. 21, 1980.

Appeal from the United States District Court for the Middle District of Louisiana.

Before BROWN, POLITZ and TATE, Circuit Judges.

TATE, Circuit Judge:

The plaintiff state agency appeals from judgment invalidating state regulation insofar as affecting dairy products processed, sold and delivered out-of-state by non-Louisiana processors. 476 F.Supp. 416 (M.D. La. 1979). The appellant, the Louisiana Dairy Stabilization Board, initially filed suit seeking a declaratory judgment, 28 U.S.C. § 2201, with respect to its powers to regulate the defendant out-of-state processors under the Louisiana Dairy Stabilization Law, La. R.S. 40:931.1 et seq., and the regulations promulgated thereunder,

Dairy Stabilization Board Regs. § 1.1 et seq. The defendants counterclaimed for a declaration that the attempted application of the Louisiana provisions to them violates, inter alia, the Commerce Clause of the United States Constitution. The district court held that the application of the Louisiana law and regulations to the out-of-state transactions between the defendant out-of-state processors and the Louisiana retailers did indeed violate the Commerce Clause, and it entered a judgment permanently enjoining the Board from enforcing certain provisions of the Louisiana Dairy Stabilization Law and Board regulations (regarding licensing and assessment requirements) with respect to the defendant processors' out-of-state activities. We affirm.

Regulatory Context of Litigation

The Louisiana Dairy Stabilization Board (hereinafter referred to as the "Board") was created by the Louisiana legislature in 1976. According to the enabling act, Diary Stabilization Law, La. R.S. 40:931.1 et seq., regulation of the milk industry is necessary to ensure that price wars, unfair methods of competition, and disruptive trade practices do not weaken the financial condition of dairy farmers, processors, and distributors, while failure to regulate unfair competition and disruptive trade practices will tend to create a monopoly in the processing and distribution of milk and dairy products that may lead to excessive prices and inadequate supplies. Section 931.1.

In order to achieve stabilization of the dairy industry, the statute grants the Board certain powers to prevent unfair methods of competition and destructive trade practices. Section 931.8. All processors located within Louisiana and all processors who sell dairy products to a retailer or a distributor for resale in Louisiana (whether or not they are located within the state) must be licensed by the Board. Section 931.10. The records of all licensed processors are subject to inspection by the Board or its authorized representative, Section 931.11, and all licensed processors must pay an assessment of three cents per hundredweight of all milk equivalents used in the processing of their dairy products, Section 931.13 B. The statute expressly provides that the funds obtained through the assessments are to be used for the administration and enforcement of the statute and the regulations promulgated thereunder by the Board. Section 931.13 B. The Board does not have the power to regulate or establish wholesale or retail prices for dairy products. Section 931.5. However, under its authority to prevent unfair competition and disruptive trade practices, the Board has promulgated regulations prohibiting certain price differentials by retailers, Dairy Stabilization Board Regs. § 13.1.1, and price discrimination between different purchasers of like commodities, Regs. § 13.1.2.

In the instant suit, the Board seeks to apply its rules and regulations to the defendant out-of-state processors. Specifically, the Board contends that the processors must be licensed, and,

as licensed processors, they must pay the assessments of three cents per hundredweight on all milk equivalents used in the processing of their dairy products due under the statute. The enactment makes no distinction between in-state and out-of-state processors for licensing purposes, nor does it make any such distinction in the obligations of licensees (enforceable by the Board), described by the district court as including: "requirements for detailed record keeping; regulations as to required time of payment for products sold to retailers; restricted methods of delivery of goods; prohibitions against granting extensions of credit to retailers; prohibitions against spending excessive amounts for entertaining or making charitable contributions or gifts; regulations pertaining to use or possession of milk cases belonging to another processor; and regulations concerning furishing of samples to consumers or signs to retailers." 476 F.Supp. at 418.

The District Court Holding Affirmed

The district court invalidated, as offending the Commerce Clause of the federal constitution, the Louisiana requirements that the out-of-state processors obtain licenses from the Louisiana regulatory agency. The invalidation had the effect of relieving the out-of-state defendants of any obligation to pay assessments to the Board on milk processed out-of-state and sold and delivered out of Louisiana (even though sold and delivered to Louisiana purchasers and packaged and intended for retail by these purchasers in Louisiana markets), or to submit to the economic and ecomonic record-keeping regulations of the Louisiana regulatory agency.

The district court found that the defendant processors completed the processing of the products sold to the Louisiana retailers in states other than Louisiana. Furthermore, it found that the sale and delivery of those products took place outside of Louisiana. These findings are not clearly erroneous.

Under these factual findings, the application of the Louisiana Dairy Stabilization Law and regulations to these out-of-state processors based on the out-of state sale of their products for resale in Louisiana violates the Commerce Clause of the United States Constitution. It unreasonably burdens the flow of interstate commerce by restricting access of out-of-state suppliers to local markets in order to protect local economic interests. *Schwegmann Bros Giant Super Markets v. Louisiana Milk Com'n.*, 365 F.Supp. 1144 (M.DLa.1973), *aff'd.* 416 U.S. 922, 94 S.Ct. 1920, 40 L.Ed.2d 279 (1974); *Baldwin v. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935). See generally Tribe, American Constitutional Law § 6-6, pp. 328-30 (1978).

The Board argues that the cited decisions concerned attempts at fixing the price of out-of-state products, whereas the present regulatory scheme merely involves assessment and record-keeping requirements necessary to effectuate the Board's responsibility as "an anti-trust enforcement agency" to regulate unfair methods of competition and disruptive trade practices

that weaken the financial condition of dairy farmers, processors, and distributors of the Louisiana dairy industry, and that tend to create a monopoly therein. The alleged "anti-trust" purposes of the regulation are relied upon as talismanic distinction of the present statute from the statutes previously invalidated under the Commerce Clause as attempting price-regulation on out-of-state transactions.

The purported distinction is ineffectual in evading the ultimate holdings of the cited *Schwegmann* and *Baldwin* decisions. They are to the effect that, although Louisiana may have the power and right to regulate the production, processing, and distribution of milk products within the state, it has by virtue of the Commerce Clause no power to project its economic regulation—at least insofar as the purpose is to protect local ecomomic interests—to production, processing, and sale of dairy products at places without the state. As stated in *Baldwin*, 294 U.S. at 527, 55 S.Ct. at 502:

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so

> contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. . . . The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

Baldwin's principle that one state may not burden interstate commerce in order to protect local ecomomic interests from out-of-state economic competition has been affirmed in the succeeding decades. *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949), for instance, cited with approval its "principle that the State may not promote its own economic advantages by curtailment of burdening of interstate commerce," 336 U.S. at 532, 69 S.Ct. at 662, and noted a "distinction" that applies to many of the decisions relied upon presently by the appellant Board "between the power of the State to shelter its people from menances to their health or safety and from fraud, even when these dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage. . . ." 336 U.S. at 533, 69 S.Ct. at 662.

Most recently, in *Philadelphia v. New Jersey*, 437 U.S.

617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), the court noted that where legislative objectives *other* than economic protectionism of its people from competition from interstate trade are concerned, it has utilized a flexible balancing test that may permit tolerating the burden on interstate commerce in the light of the nature of the legitimate local purpose and the degree of the burden and whether the local interest could be promoted with lesser impact on interstate activity, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). However, citing both *Hood & Sons* and *Baldwin* the court further noted, in striking down a restriction on importation of waste substances into the state:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unaviodable when a State legislates to safegaurd the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.

437 U.S. at 620, 98 S.Ct. at 2535.

These holdings and teachings of the Supreme Court are dispositive of most of the appellant Board's contentions that its attempt at economic regulation of out-of-state economic activity should not be invalidated under the Commerce Clause. The

Board essentially contends that the burden on interstate commerce is justified by the legitimate local purpose of preventing local economic disruption and the development of monopolies affecting the local market; whereas the Supreme Court has held that the Commerce Clause prevents a state from burdening interstate commerce for the purpose specified, i.e., to restrict economic competition from without the state.

The Board's Additional Contentions

On appeal, the Board additionally suggests numerous decisions that it contends require a contrary resolution of the Commerce Clause issue. However, the cases relied upon are distinguishable because: either (1) the state laws upheld were not applied extraterritorially, or (2) the state interest sought to be advanced was the protection of public health and safety rather than (as here) the economic stability of in-state industry.

The Board further contends that the trial court erred in denying its motion for a partial new trial. The motion was based on statements by the trial judge, which allegedly misled counsel for the Board, who, as a result, failed to introduce certain evidence concerning the defendants' "doing business" in

Louisiana.[1] The trial judge did not abuse his discretion in denying the Board's motion for a partial new trial. The record reveals that the Board did in fact introduce evidence through examination of the defendants' president pertaining to the extent that defendants were "doing business" in the state and its character. The record does not support the Board's contention that it was misled by the district court's comments. Further, as the trial court noted in denying the new-trial motion, the issue of whether or not the defendants had sufficient Louisiana contacts so as to be "doing business" in the state for jurisdictional purposes, is not of weighty relevance, if any, to the determination of the actual issue before the court: whether or not the Louisiana regulatory agency could apply its licensing and assessment regulations to the defendant out-of-state processors

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1. In its brief (p.3), the appellant Board summarizes the nature of the "doing business" evidence it relies upon:

> Defendants have engaged, and do engage, in numerous commercial activities in the State of Louisiana. These activities include making sales calls, attending industry meetings, purchasing and picking up raw products, placement of equipment and placement of merchandise in retail outlets for sale to Louisiana consumers as well as other activities normally associated with the carrying on of commerce or doing of business. While not the only substantial business being carried on in Louisiana by defendants, the largest-single account is Schwegmann Brothers Giant Super-Markets of New Orleans, Louisiana.

with regard to dairy products processed, sold, and delivered out-of-state.

Conclusion

For the reasons stated, we AFFIRM the trial court judgment.

APPENDIX B

1. OPINION OF THE DISTRICT COURT
2. JUDGMENT OF THE DISTRICT COURT
3. DISTRICT COURT MINUTE ENTRY

B-1

LOUISIANA DAIRY STABILIZATION BOARD

v.

DAIRY FRESH CORPORATION and Dairy Fresh Ice Cream Corporation.

Civ. A. No. 78-34-B.
United States District Court,
M.D. Louisiana.

Sept. 20, 1979.

E. GORDON WEST, Chief Judge.

This case is brought by the Louisiana Dairy Stabilization Board (the Board), a regulatory agency of the State of Louisiana, seeking a declaratory judgment pertaining to its powers to regulate the defendant companies, both of whom are nonresidents of the State of Louisiana, and neither of whom is qualified to do business in Louisiana, or has offices or employees in this State for the conduct of business. For the following reasons, the Court concludes that under the particular facts of this case, the Board cannot extend its rules and regulations, nor the provisions of the Dairy Stabilization Law (the Act), La.R.S. 40:931.1 et seq., to cover the activities involved in this case of these defendants, and the plaintiff must be enjoined from so doing.

FINDINGS OF FACT

1. Plaintiff, the Louisiana Dairy Stabilization Board, was created as a part of the Louisiana Dairy Stabilization Law in 1976 by Act 695 of 1976 (La.R.S. 40:931.1 et seq.)

2. The reasons for the passage of that law were stated to be:

"(6) . . . the dairy industry is peculiarly susceptible to injury resulting from price wars and a variety of disruptive trade practices that flourish in the absence of effective regulation.

* * * * * * * * * *

"(10) That failure to provide effective regulation of the Louisiana dairy industry will lead to a resumption of unfair methods of competition that once existed in the Louisiana dairy industry . . . and will tend to create a monopoly in the processing and distribution of milk and dairy products.

* * * * * * * * *

"(14) That monopoly, disruptive trade practices, and unfair methods of competition should be prohibited in Louisiana dairy industry."

3. The specific functions of the Dairy Stabilization Board are declared to be:

"B. The board is hereby empowered and directed to prevent persons, partnerships and corporations from using unfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices in the sale of milk and milk products, and the board, after notice and hearing, shall promulgate rules and regulations implementing the policy and purposes of this Subpart. . . ."

4. The Act requires any processor who sells dairy products "to a retailer or a distributor for resale in the State of Louisiana" to have a license issued by the Board.

5. The Act does not differentiate between in-state and out-of-state processors.

6. The Act authorizes the Board "to assess each processor licensed by it three cents per hundredweight on all milk equivalents used in the processing of dairy products." This assessment is declared to be for the purpose of obtaining funds for the administration and enforcement of the regulations issued by the Board.

7. In addition to licensing and assessment authority, the Board is empowered to enforce certain "obligations of licensees" which include such things as requirements for detailed record keeping; regulations as to required time of payment for products sold to

retailers; restricted methods of delivery of goods; prohibitions against granting extensions of credit to retailers; prohibitions against spending excessive amounts for entertaining or making charitable contributions or gifts; regulations pertaining to use or possession of milk cases belonging to another processor; and regulations concerning furnishing of samples to consumers or signs to retailers. No distinction is made between in-state and out-of-state processors.

8. The Louisiana Milk Commission (Milk Commission) was the predecessor of the Dairy Stabilization Board. The Commission was given authority to set retail prices on dairy products.

9. During the existence of the Milk Commission, Schwegmann Giant Super Markets (Schwegmann) was purchasing dairy products from sources outside the State of Louisiana, and sued the Milk Commission, alleging that the Commission could not control prices paid for dairy products where the purchases were made outside the State of Louisiana. It was contended that this was a violation of the Commerce Clause of the United States Constitution, and also of the Fourteenth Amendment to the United States Constitution. A three judge Federal Court agreed with Schwegmann, and that Court's decision was affirmed by the United States Supreme Court. See *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F.Supp. 1144 (M.D.La.–1973), aff'd 416 U.S. 922, 94 S.Ct. 1920, 40 L. Ed.2d 279 (1974).

10. After that decision, Schwegmann entered into an agreement with Dairy Fresh, defendants in the present suit, to purchase dairy products in Mississippi and transport them to Louisiana for resale. This was objected to by the Louisiana Health and Human Resources Administration, who refused to issue a permit for the sale of Dairy Fresh products in Louisiana.

11. After extensive litigation, the state health officials were ordered to permit the importation and resale of these products in Louisiana. See *Schwegmann Bros. Giant Super Markets v. Edwards*, 323 So.2d 810 (La. 4th Cir.–1975), writ denied, 326 So.2d 503 (La.–1976).

12. In 1976 the Milk Commission was abolished and in its place the Dairy Stabilization Board was created. La.R.S. 40: 931.1, et.seq.

13. The new Board was not given authority to fix prices, but instead was endowed with the power to do the things hereinbefore enumerated, including the power to issue licenses, to levy assessments, and to regulate "unfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices. . . ." La.R.S. 40:931.8.B.

14. After the Court ruling which permitted the importation of dairy products into the state for resale, in March of 1976, with-

out any request therefore on the part of Dairy Fresh, the Dairy Stabilization Board delivered a license and a packet of forms to the Dairy Fresh office manager in Hattiesburg, Mississippi, who, at that time, apparently, at the request of the deliver, signed an application for the license. Neither the plant manager nor the president of Dairy Fresh were consulted about the delivery license.

15. In May of 1976, Schwegmann entered into an agree - ment with Dairy Fresh for the purchase and importation for resale of frozen desserts. The state health officials refused to issue a permit without notification that a license had been issued by the Board.

16. When counsel for Dairy Fresh contacted the board, he was, for the first time, informed that a license for the processing of dairy products had been issued to Dairy Fresh in March. It was then agreed that the Board would issue a license to Dairy Fresh for the processing of frozen foods but that Dairy Fresh would reserve its right to contest any attempt of the Board to levy assessments or in any way regulate the out-of-state sales by Dairy Fresh to Schwegmann.

17. It was not until three months after the issuance of the frozen dessert license that the Board attempted to levy the three cents per hundredweight assessment against Dairy Fresh. This occurred on August 20, 1977, when counsel for Dairy Fresh received a letter from counsel for the Board making inquiry concerning failure of Dairy Fresh to pay the assessment.

Dairy Fresh, through counsel, responded that all sales to Schwegmann were out-of-state sales and thus were not subject to assessment or regulation by the Board.

18. It was not until about a year later that a complaint was filed with the Board, and on October 25, 1977, a hearing was held. When the Board contended that Dairy Fresh could not complain because it had accepted a license to process dairy products and frozen desserts, Dairy Fresh renounced its license.

19. Dairy Fresh has continued to sell to Schwegmann since 1977 without a license from the Broad.

20. The three cent per hundredweight assessment provided for in the Act is in fact an assessment that is used by the Board to enforce the provisions of the Dairy Stabilization Law and is not a tax used by the State to generate revenue. Insofar as it is applicable to Louisiana processors, it is a valid assessment imposed by the State to effectuate a valid exercise of its police powers.

21. This suit was filed by the Louisiana Dairy Stabilization Board on January 27, 1978, with the Board seeking a declaratory judgment that the licensing requirements and the assessments made against the defendants are valid exercises of the

Board's powers, and the defendants contending that the application of these regulations by the Louisiana Board to an out-of-state processor is constitutionally infirm as violative of the commerce clause of the United States Constitution and the Fourteenth Amendment thereto.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this case under its federal question jurisdiction. 28 U.S.C. § 1331.

2. The Dairy Stabilization Law, which creates the Dairy Stabilization Board as an agency of the State of Louisiana, is designed to create a program of regulation for the Louisiana Dairy Industry. La.R.S. 40:931.1(17).

3. The Dairy Stabilization Law requires licensing of all processors retailers, and distributors of dairy products, and it makes it unlawful for them to operate without a license. No distinction is made between in-state and out-of-state processors. All licensed processors are required to pay an assessment of three cents per hundredweight on all milk equivalents used in the processing of dairy products used in Louisiana, regardless of whether the processor is a citizen of Louisiana or not, and regardless of where the transaction by which the Louisiana retailer acquired the products took place. La.R.S. 40:931.10 and 931.13 (B).

4. While neither the Act nor the regulations of the Board exempt out-of-state processors who sell their products to Louisiana retailers from the operation of the Act, the regulations of the Board do exempt products sold by Louisiana processors to purchasers out of the state. Dairy Stabilization Board Rules and Regulations § 12.9.

5. The Court has found, as a fact, that the defendant processors completed the processing of the products here involved in states other than Louisiana, and that the sale of those products took place outside of Louisiana. The mere fact that defendants were aware of the fact that after the sale the products were to be transported into Louisiana for resale by the retailer does not subject the processing activities conducted in Mississippi to tax or assessment by the State of Louisiana. See *American Oil Company v. Neill*, 380 U.S. 451, 85 S.Ct. 1130, 1134, 14 L.Ed.2d 1 (1965).

6. The Court is cognizant of the fact that:

> "Different considerations arise in police power cases involving regulations of a foreign corporation or its products in the interest of the health, welfare, comfort and safety of the state's citizens. In such a case the court has, often explicitly, sought to balance the state's interest in the regulation, as measured by its purpose and effectiveness,

against the federal interest in freedom of the commerce involved from the burden in question. This involves consideration of the measure, the extent to which the statute deals with matters of peculiarly local concern which can be adequately regulated only by the particular state, and the practical effect of the burden." *Corporate Registration: A Functional Analysis of Doing Business,* 71 Yale L.R. 575, 582.

While the three cent per hundredweight is relatively small, the same benefit to the State of Louisiana could be derived by directing assessments against in-state retailers rather than out-of-state processors, and thus avoid the direct burden, however small, on interstate commerce.

7. Although Louisiana, through its Dairy Stabilization Board, may assess the processing of dairy products in the State of Louisiana, it may not project its regulations to processors locat ed outside the state, particularly where the products involved are wholly processed outside of Louisiana and and are then sold and delivered by the processor to a retailer outside of the State of Louisiana. The fact that the product later finds its way into the State of Louisiana does not alter this conclusion. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission,* supra.

8. The Dairy Stabilization Law itself recognizes the legal limitations on its scope. The Act provides:

"The authority of the Commissioner to regulate bulk

milk and of the board to regulate dairy products moving in interstate commerce shall be construed to be as great as, but not to exceed, the limits imposed by the United States Constitution." La.R.S. 40:931.19.

The Board also recognized its limitations when it promulgated Section 12.9 of its Rules and Regulations which states that:

"No processor shall be required to pay assessments on products sold outside of this state."

9. The Court therefore finds, as a matter of law, that the Commerce Clause of the United States Constitution prohibits the application of the Louisiana Dairy Stabilization Law, La. R.S. 40:931.1, et seq., and all of its provisions, and the regulations promulgated pursuant thereto by the Louisiana Dairy Stabilization Board to processors located outside of the State of Louisiana in all cases where the dairy products or the frozen dessert products involved are processed, sold and delivered outside of the State of Louisiana.

Counsel for defendants are instructed to furnish the Court with a proposed judgment to be entered in this case not inconsistent with this opinion.

B-12

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LOUISIANA DAIRY STABILIZATION BOARD	*	CIVIL ACTION
VERSUS	*	NO. 78-34
DAIRY FRESH CORPORATION and DAIRY FRESH ICE CREAM CORPORATION	*	SECTION "A"
	*	(filed 12/7/79)

JUDGMENT

For the reasons set forth in the Court's Findings of Fact and Conclusions of Law filed on September 20, 1979;

IT IS ORDERED, ADJUDGED AND DECREED that La. R.S. 40:931.10, La. R.S. 40:931.13 and the regulations promulgated thereunder by the Louisiana Dairy Stabilization Board as applied to the activities of Dairy Fresh Corporation and Dairy Fresh Ice Cream Corporation carried on outside the State of Louisiana, be, and they are hereby, declared to violate the Commerce Clause of the United States Constitution;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Louisiana Dairy Stabilization Board be, and it is hereby, permanently enjoined from enforcing the provisions of La. R.S. 40:931.10, La. R.S. 40:931.13 and the regulations promulgated thereunder by the Louisiana Dairy Stabilization Board with respect to the activities of Dairy Fresh Corporation and Dairy Fresh Ice Cream Corporation carried on outside the State of Louisiana;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party shall bear its own costs.

Baton Rouge, Louisiana, this 7th day of December, 1979.

/S/_____

United States Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
JANUARY 7,1980
WEST, J.

LOUISIANA DAIRY STABILIZATION BOARD — CIVIL ACTION

VERSUS — NUMBER 78-34-A

DAIRY FRESH CORPORATION AND
DAIRY FRESH ICE CREAM CORPORATION

* * * * *

This matter is before the Court on plaintiff's motion for a "partial new trial." No oral argument is required in this matter.

This matter was tried to the Court, without a jury, and judgment was rendered in favor of the defendant on September 20, 1979. This case involved the application of a regulation issued by the Louisiana Dairy Stabilization Board to the defendants, who are out-of-state processors of dairy products. At the commencement of this trial the issue was raised as to whether or not the defendants were "doing business" in the State of Louisiana. This Court made a finding at the outset of the case that the defendants were "doing business" in the State of Louisiana and this finding was made solely for the purpose of jurisdiction and/or venue. The question of whether or not the defendants were "doing business" in the State was not the issue in the case. The issue in the case was whether or not the

defendants, as out-of-state processors of dairy products, who processed, sold, and delivered their product outside the State of Louisiana to a Louisiana purchaser who then transported the product into Louisiana and sold it was subject to an assessment provided for in a regulation issued by the Louisiana Dairy Stabilization Board. Simply stated, the Court found that the Louisiana Dairy Stabilization Board could not extent its assessment powers to an out-of-state processor insofar as the products processed by that processor were processed, sold and delivered outside of the State of Louisiana. When the judgment was entered in this case, it was limited to a holding that the plaintiff could not apply its assessment regulation to the defendant under those circumstances,. The Court did not hold that the regulations of the Louisiana Dairy Stabilization Board could not, under any circumstances, be applicable to the defendants in other possible activities conducted by them while doing business in the State of Louisiana. That simply was not an issue to be decided in this case. The holding in this case was the narrow holding that the portion of the regulation issued by the plaintiff assessing these defendants on the products involved in this litigation was illegal and could not be applied. If it develops that there are other activities of the defendant in connection with its business, if they have any, in the State of Louisiana, which the plaintiff attempts to regulate, and if the defendants object thereto, such objections must be the basis of another law suit. They were not involved in this case.

In the brief filed by counsel for the plaintiff in connection with this motion for "partial new trial," it is stated: "Plaintiff requests an opportunity to present evidence to prove the

extent that defendants were doing business in Louisiana to convince the Court that its initial determination relative to this issue was correct." We must say that we need not further evidence to convince us that we were correct in our initial determination. We were convinced then and we are convinced now and we are further convinced that the question of whether or not the plaintiff was doing business in the State of Louisiana was not crucial to the question of whether or not the plaintiff could apply its assessment provisions to the defendant out-of-state processor. We held that it could not. Therefore:

IT IS ORDERED that plaintiff's motion for "partial new trial" be, and it is hereby DENIED.

/S/_____

UNITED STATES DISTRICT JUDGE

APPENDIX C

ORDER OF THE FIFTH CIRCUIT DENYING MOTION FOR REHEARING

C-1
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-3112

LOUISIANA DAIRY STABILIZATION BOARD,

Plaintiff-Appellant,

versus

DAIRY FRESH CORPORATION and
DAIRY FRESH ICE CREAM CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the
Midddle District of Louisiana

ON PETITIONS FOR REHEARING
(February 18, 1981)

Before BROWN, POLITZ and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ Albert Tate
United States Circuit Judge

APPENDIX D

NOTICE OF APPEAL

D-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

LOUISIANA DAIRY STABILIZATION BOARD,

Appellant,

vs.

Civil Action No. 80-3112

DAIRY FRESH CORPORATION AND DAIRY FRESH ICE CREAM CORPORATION,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

---

1. Notice is hereby given that plaintiff-appellant, LOUISIANA DAIRY STABILIZATION BOARD, hereby appeals to the Supreme Court of the United States from the judgment entered by this court on November 21, 1980 and the denial of rehearing entered by this court on February 18, 1981.

2. This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

/S/

Vernon V. Palmer, Esq.
M. David Gelfand, Esq.
Attorneys for Appellant
Louisiana Dairy Stabilization Board
7031 Freret Street
New Orleans, LA 70118
(504) 866-2751

C. James Gelpi, Esq.
(admission to Supreme Court pending)
Attorney for Appellant
Louisiana Dairy Stabilization Board

Date: April 22, 1981

D-3

CERTIFICATE OF SERVICE

A copy of this Notice was served on Michael Fontham, Esq. and John M. Landis, Esq., counsels of record for Appellees in this case, by depositing a copy of said Notice in a United States mailbox, with first-class postage prepaid, addressed to them at: Stone, Pigman, Walther, Wittman & Hutchinson, 1000 Whitney Bank Building, New Orleans, Louisiana 70130.

/S/_____

April 22, 1981

APPENDIX E

PROVISIONS OF THE LOUISIANA DAIRY STABILIZATION LAW INVALIDATED BY DISTRICT COURT'S JUDGMENT

La. Rev. Stat. § 40:931.10, Licenses:

A. It shall be unlawful for a processor to buy bulk milk without being licensed as a processor by the commissioner if such processor:

(1) Operates a processing plant located within the State of Louisiana; or

(2) Sells dairy products to a retailer or a distributor for resale in the State of Louisiana; or

(3) Sells dairy products to consumers within the State of Louisiana.

B. It shall be unlawful for a processor to sell dairy products without being licensed as a processor by the board if such processor:

(1) Operates a processing plant located within the State of Louisiana; or

(2) Sells dairy products to a retailer or a distributor for resale in the State of Louisiana; or

(3) Sells dairy products to consumers within the State of Louisiana.

C. A separate processor license shall be obtained for each processing plant that is located within the State of Louisiana and for each plant from which dairy products are sold to a retailer or a distributor for resale in the State of Louisiana or to consumers within the State of Louisiana.

D. It shall be unlawful for a distributor to sell dairy products within the State of Louisiana without being licensed as a distributor by the board.

E. Each retailer now holding a retailer license issued by the Louisiana Milk Commission is hereby declared to be a retailer licensee of the board. It shall be unlawful for any retailer not so licensed to sell dairy products without being licensed as a retailer by the board. A separate retailer license shall be obtained for each retail establishment or unit.

F. The licenses application of each processor, distributor and retailer required by this Subpart to be licensed by the board or by the commissioner shall be submitted prior to November 1, 1976, or prior to engaging in the business for which the license is required by this Section. Licenses shall remain in effect until suspended or revoked. Such licenses shall be in addition to any other licenses required by law and may not be assigned or transferred. No person licensed by the board or by the commissioner shall be required to pay a license fee.

G. Licenses issued by the board, including retailer licenses may be suspended or revoked by the board on or after October 1, 1976, upon compliance with the requirements of Chapter 13 of Title 49 of the Louisiana Revised Statutes of 1950 if the licensee has failed to comply with this Subpart or with the regulations issued by the board. Licenses issued to processors by the commissioner may be suspended or revoked by the commissioner upon compliance with the requirements of Chapter 13 of Title 49 of the Lousiana Revised Statutes if the licensee has failed to comply with this Subpart or with the regulations or the applicable production stabilization plan is-

sued by the commissioner. The commissioner may, if requested by a licensee, permit the payment of a penalty in an amount to be set by the commissioner in lieu of a license suspension. The board may, if requested by a licensee, permit the payment of a penalty in an amount to be set by the board in lieu of a license suspension.

La. Rev. Stat. § 931.13. Assessments;

A. In order to obtain funds for the administration and enforcement of the regulations and production stabilization plans issued by him pursuant to this Subpart and for the administration and enforcement of that portion of this Subpart for which he is made responsible, the commissioner shall, commencing on August 1, 1974, assess each processor licensed by the commissioner pursuant to this Subpart one and one-half cents per hundredweight on all milk purchased under any production stabilization plan and shall assess each dairy farmer one and one-half cents per hundredweight on all milk sold to a processor regulated by any production stabilization plan.

B. In order to obtain funds for the administration and enforcement of the regulations issued by the board pursuant to this Subpart and for the administration and enforcement of that portion of this Subpart for which the board is made responsible, the board shall, commencing on October 1, 1976, assess each processor licensed by it three cents per hundredweight on all milk equivalents used in the processing of dairy products.

C. All assessments authorized in this Section shall be payable monthly on or before the last day of the month following the month during which they accrue.

[The entire Dairy Stabilization Law is printed in the pamphlet separately lodged with Clerk of this Court.]

80-1958

LOUISIANA DAIRY STABILIZATION BOARD

" . . . an antitrust enforcement agency"

RULES AND REGULATIONS

*****

. . . 1979 edition . . .

Published by
Louisiana Dairy Stabilization Board
C. James Gelpi, Director-Attorney

State of Louisiana

DAIRY STABILIZATION BOARD

"... an antitrust enforcement agency"

Dear Friends:

This document contains the Rules and Regulations which are administered by the Louisiana Dairy Stabilization Board. They have been arranged in what we believe is an orderly fashion that will facilitate the use of this book with an index for your convenience. Also, the applicable law has been included and indexed for your easy reference.

The new Dairy Stabilization Board is continuing to seek and find ways of carrying out its duties under the law in a manner that is consistent with efficiency, good judgment and common sense. The task of completely reorganizing the Rules and Regulations of the Board is just one example.

The new Dairy Stabilization Board will continue to protect the free enterprise system through the prevention of antitrust activity in the interest of the entire public, and will do so in the manner prescribed by our Louisiana Legislature.

Herbert Kramer
Chairman
Ben H. Grayson
Vice-Chairman
Vernon Toups, Jr.
Secretary
—
Members
Mack Abraham
Lyle Degelos
Teddy Gabb, Sr.
A. G. Magee, Jr.
Polk Tiner
—
C. James Gelpi
Director-Attorney

PART ONE

DAIRY STABILIZATION BOARD RULES AND REGULATIONS

****

PART TWO

DAIRY STABILIZATION LAW
as amended through 1978 Regular Session

This public document was published at an annual cost of $2.52 per copy by Division of Administration, Administrative Services, P. O. Box 44095, Baton Rouge, Louisiana 70804 to define the Rules and Regulations of the Louisiana Dairy Stabilization Board under the authority of L.R.S. 40:931.8 B. This material was printed in accordance with the standards for printing by State agencies established pursuant to R.S. 43:31.

. . . 1979 Edition . . .

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PART ONE

DAIRY STABILIZATION BOARD RULES AND REGULATIONS

PART ONE

DAIRY STABILIZATION BOARD RULES AND REGULATIONS

General Provisions

LAC 2-17:1 Definitions

§1.1 The definitions of the following terms contained in R.S. 40:931.2 are adopted as the definitions of these terms for the purpose of these regulations: person, distributor, processor, retailer, supplier and milk.

§1.2 The following definitions shall be applicable throughout these regulations:

"Act" means all of Subpart C of Part VII of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950, sometimes referred to as the Dairy Stabilization Law.

"Adjudication" or "adjudicatory proceeding" means Board process for the formulation of a decision or order.

"Agent" means an employee or other person authorized by and acting on behalf of the Board.

"Board" means the Louisiana Dairy Stabilization Board.

"Centralization billing" is the procedure whereby processors and/or distributors contract with wholesale grocers or wholesale grocery cooperatives providing for billing services and/or guarantee of payment or other services to be performed by said wholesale grocers or wholesale grocery cooperatives whether for compensation or not and regardless of the method of delivery of said dairy products utilized.

"Charitable institution" means any facility operated by a nonprofit organization, donations to which are deductible pursuant to federal statutes and regulations relating to income taxation.

"Cost" as used herein shall be defined as it is defined in R.S. 51:421 (F).

"Dairy product" means any of the products listed or referred to in R.S. 40:931.2 (10).

"Decision" or "order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of the Board, in any matter other than rulemaking, required by constitution or statute to be determined on the record after notice and opportunity for Board hearing.

"Dock pickup delivery method" means that delivery method where title and possession to dairy products passes from the seller to the buyer or the buyer's agent at the seller's dock.

"Drop delivery method" means that delivery method where title and possession to dairy products passes from the seller to the buyer or the buyer's agent at the back door or refrigerated storage cooler of the buyer.

"Frozen dessert" means ice cream, fruit ice cream, nut ice cream, ice milk, malt ice milk, malt ice cream, French ice cream, milk sherbets, mellorine, olarine, sherine, and the mix from which any such product is made.

"Full service delivery method" means that delivery method where the dairy products are delivered by the seller to the buyer or the buyer's agent at the point of ultimate sale.

"Hospital" means any facility licensed by the Department of Health and Human Resources as a hospital or nursing home.

"Institution" means the State of Louisiana, any of its political subdivisions, any religious or charitable institution, any hospital and any school.

"Licensee" means any person licensed by the Board in accordance with the provisions of the Act and with these regulations.

"Milk case" means the wood, metal, or plastic container essential for transporting or delivering cartons, bottles, jugs, or other packages of dairy products.

"Nonprocessing retailer" means a person whose processing activities are only incidental to what is primarily a retail operation.

"Parish or city school board" means any school board or other governing authority of any elementary or secondary school in this state.

"Plant dock" means a licensed processing plant where milk is regularly processed or a branch operation that has a fixed constructed facility for dairy products cold storage, an office, and where trucks are regularly loaded. All existing and new "docks" must be approved by the Board.

"Rule" means each Board statement of general applicability and future effect that implements, interprets, or prescribes substantive law or policy or prescribes the procedure or practice requirements of the agency. A rule may be of general applicability even though it may not apply to the entire state, provided the form is general and others who may qualify in the future will fall within its provisions. The term includes the amendment or repeal of a prior rule but does not include: (a) statements concerning only the internal management of an agency

and not affecting private rights or procedures available to the public; (b) declaratory rulings or orders; or (c) intra-agency memoranda.

"Rulemaking" means the process employed by the Board for the formulation of a rule. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in a Board decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render the same a rule within this definition or constitute specific adoption thereof by the Board so as to be required to be issued and filed as provided in the Administrative Procedure Act.

"Volume discount year" is hereby defined to be the period of twelve months commencing on the first day of April and ending on the last day of March in the year which immediately follows.

Procedural Provisions

LAC 2-17:2 Investigative Hearings Purpose, Powers of the Board

§2.1 Investigative hearings shall be for the purpose of investigating conditions of the dairy industry and compliance by the industry with the Act, and regulations, including monopoly practices, disruptive trade practices, price wars, and unfair methods of competition.

§2.2 Investigative hearings may be held upon the call of the Board. Such hearings may be held in any part of the state.

§2.3 The Chairman, the Vice-Chairman, a member designated by the Chairman, or a hearing officer designated by the Board who need not be a member of the Board, shall preside at investigative hearings. All witnesses shall be sworn or shall make affirmation.

§2.4 Investigative hearings conducted by the Board shall be open to the public.

§2.5 If the Board determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall afford such person, upon request, an opportunity to appear as a witness; receive and dispose of requests from such persons to subpoena additional witnesses; and afford such person, or his attorney, upon request the opportunity to examine or cross-examine witnesses.

§2.6 The Director, upon approval of the Chairman or Vice-Chairman, is authorized to sign and issue subpoenas which require the attendance and giving of testimony by persons who may possess any knowledge concerning any offense under investigation at an investigative hearing or for investigative purposes. The subpoena shall set forth reasonable grounds therefor, and shall

order the person to appear at a designated time and place. The Director may also order the issuance of a subpoena duces tecum as described above.

§2.7 Whenever any person summoned under this regulation neglects or refuses to obey such summons or to produce books, papers, records or other data, or to give testimony as required, the Board may apply to the judge of the district court for the district within which the person so summoned resides or is found, for an attachment against him as for a contempt.

§2.8 The Chairman, Vice-Chairman or Director may determine who shall be present during the examination and may order all persons excluded, except counsel for the person subpoenaed.

§2.9 A subpoena may be served by any person authorized by law to serve civil process, or by any agent of the Board, and the return made in writing by any such person shall be accepted as proof of service.

§2.10 The Board is the sole judge of the pertinency of testimony and evidence adduced at such hearings.

§2.11 The attorney for the Board and that of any public agency which may be participating in the investigation shall have the right to be present at all hearings and shall have the right to examine or cross-examine any witness.

§2.12 Witnesses at investigative hearings may be accompanied by their own counsel.

§2.13 A copy of this regulation shall be made available to any witness and a copy shall be delivered at the time of making service, to each person upon whom a subpoena is served; in addition thereto each person upon whom a subpoena is served shall be informed in writing that the Board suggests that he consult his attorney and that his attorney should attend the hearing to advise him.

§2.14 The Board may, in its discretion, issue a report upon the conclusion of any such investigative hearing.

§2.15 As a result of such investigations, the Board may initiate adjudicatory proceedings against licensees, may refer matters to other public agencies and may take any other appropriate action.

§2.16 Investigative hearings may be conducted jointly with other interested public agencies.

§2.17 It shall not be necessary to publish any advance notice of any investigative hearing and it shall be necessary that subpoenas disclose the general nature of the investigation.

§2.18 At all investigative hearings the testimony shall be recorded stenographically or otherwise. Upon payment of the costs thereof, and when authorized by the Board, a witness may obtain a transcript copy of his testimony given at a public session.

LAC 2-17:3 Rulemaking Proceedings
Powers of the Board

§3.1 Any person may petition the Board requesting the promulgation, amendment, or repeal of a rule or a regulation. Such petitions shall be by letter and may be submitted at any time. Each such petition shall be considered by the Board within ninety days after its submission. In the event the petition is denied, the petitioner shall be notified in writing and the reasons for the denial shall be stated in writing.

§3.2 Prior to the adoption, amendment or repeal of any rule, the Board shall afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral presentation or argument must be granted if requested by twenty-five persons, by a governmental subdivision or agency, by an association having not less than twenty-five members, or by a committee of either house of the Legislature to which the proposed rule change has been referred under the provisions of the Administrative Procedure Act. The Board shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the Board, if requested to do so by an interested person either prior to adoption or within thirty days thereafter, shall issue a concise statement of the principal reasons for and against its adoption.

§3.3 Whenever the Board authorizes the commencement of a rulemaking proceeding the Director shall give or cause to be given notice of hearing in the following manner:

§3.3.1 By publication of the notice of hearing in the *Louisiana Register* (also see requirements of Administrative Procedure Act, R.S. 49:951 et seq.)

§3.3.2 By mailing a copy of the notice of hearing to all persons who have made timely requests to the agency in writing for advance notice of its rulemaking proceedings.

§3.4 The notice of a rulemaking hearing shall be published at least twenty days prior to the date on which such hearing is scheduled. Such notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon.

§3.5 Objections to the notice of hearing are waived unless filed in writing immediately following the opening of the hearing.

§3.6 At all rulemaking hearings, the Chairman shall preside, or, in his absence, the Vice-Chairman. If both the Chairman and the Vice-Chairman are absent, the Chairman shall designate some other member of the Board to preside. The Board may designate a hearing officer, who need not be a member of the Board, to preside at any rulemaking hearing.

§3.7 At least three members of the Board shall be present at all rulemaking hearings. However, no action may be taken on matters considered at such hearings until a quorum of the Board is present and participates in such action.

§3.8 At the hearing, any interested person shall be given an opportunity to appear, either in person or through his authorized counsel or representative, and to be heard with respect to matters relevant and material to the proceeding. Any interested person who desires to be heard at any hearing shall, before proceeding to testify, state his name, address, and occupation. If any such person is appearing through a counsel or representative, such counsel or such representative shall, before proceeding to testify or otherwise participate in the hearing, state for the record the authority to act as such counsel or representative, and the name and address of the person represented. Any such person or such counsel or representative shall give such other information respecting his appearance as the presiding officer may request.

§3.9 The presiding officer shall, at the opening of the hearing and prior to the taking of testimony, have noted as part of the record the notice of hearing as published and the certificate of the Director relative to the giving of notice of the hearing through means other than publication.

§3.10 The Board shall permit the presentation of oral arguments during the hearing but may not hear oral arguments on any proposal after the conclusion of the hearing unless notice is given in the same manner as the original notice of the hearing.

§3.11 Cross-examination shall be permitted to the extent required for a full and true disclosure of the facts.

§3.12 All written statements, charts, tabulations, or similar data offered as part of the record of the hearing shall, after identification by the proponent and upon satisfactory showing of the authenticity, relevancy, and materiality of the contents thereof, be numbered as exhibits and made a part of the record. Such exhibits shall be submitted in quadruplicate and in documentary form. In case the required number of copies is not made available, the presiding officer shall exercise his discretion as to whether said exhibits, shall, when practicable, be read in evidence or whether additional copies shall be required to be submitted within a time to be specified by the presiding officer.

§3.13 If a party objects to the admission or rejection of any offering or to any other ruling of the presiding officer during the hearing, he shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the presiding officer. The ruling of the presiding officer on any objection shall be a part of the record. Only objections made before the presiding officer may subsequently be relied upon in the proceeding.

§3.14 Portions of the record of prior hearings held by the Board may be incorporated by reference.

§3.15 The Board shall not be bound by rules of order, evidence, or procedure in rulemaking hearings except those contained in these regulations, those which it may establish, and those which may be specifically prescribed by statute.

§3.16 If any interested person fails to appear at the hearing he shall be deemed to have waived the right to be heard in the proceeding.

§3.17 The Board may act without permitting the filing of briefs and exceptions or it may elect to do one or both of the following things prior to taking final action:

§3.17.1 Permit the filing of briefs by interested persons.

§3.17.2 Notify interested parties of the action which the Board proposes to take and permit the filing of exceptions.

§3.18 If the Board elects to permit the filing of briefs, the presiding officer shall announce at a hearing the deadline for filing such briefs with the Board or mailing such briefs to the Board. Such briefs may contain proposed findings and conclusions and written arguments.

§3.19 If the Board elects to permit the filing of exceptions, notification of the Board's proposed action shall be given in the same manner as the notice of hearing. The said notice shall set forth the deadline for the filing of exceptions by interested parties. Such exceptions shall be in writing and may suggest appropriate changes in the Board's proposed action.

LAC 2-17:4 Adjudicatory Proceedings Complaints, Hearings, Powers of the Board

§4.1 Whenever the Director has reason to believe that a licensee has violated the Act or any regulation, he shall mail to the licensee a written notice in compliance with R.S. 49:955.

§4.2 Within eight days after the date on which the licensee receives such a written complaint, such licensee shall mail to the Director a written statement in response to the said complaint. In such written statement, the licensee shall plead "guilty," "nolo contendere" or "not guilty" to each violation charged in the complaint. The Chairman may extend the period during which such licensee may submit a plea in response to such a complaint whenever good cause for such an extension is shown.

§4.3 If the licensee fails to respond to the complaint within the period prescribed in Section 4.2 hereinabove, the Board may suspend or revoke the license of such person without holding a hearing or complying with other formalities. Whenever a licensee submits a plea of "not guilty" in response to a complaint, the Director shall mail to such licensee a notice of the time, date and place of the hearing at which the Board will consider evidence presented by the Board staff in support of the charges made in the said complaint and evidence

presented by or on behalf of the licensee in his defense. Such notice shall contain a statement that the Board may either suspend or revoke the licensee's license upon a finding of "guilty." The date on which the hearing is held shall be at least twelve days after the date on which such notice is mailed to the licensee.

§4.4 In those cases where the Director has reason to believe that the violation is continuing beyond the date on which the licensee received the complaint, he may notify the licensee of the date, time and place of a hearing at which the Board will consider only the suspension of the licensee's license for a period of ten days or less. Such hearings may be scheduled for the third day following the date on which the licensee actually receives such notice, or for any subsequent date.

§4.5 The Chairman, the Vice-Chairman and the Director are each authorized to sign and issue subpoenas in the name of the Board, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence. No subpoena shall issue until the party requesting it first deposits with the Board the fees and expenses required by R.S. 13:3661 and R.S. 13:3671. A subpoena may be served by any person authorized by law to serve civil process or by any agent of the Board, and the return made in writing by any such person shall be accepted as proof of service.

§4.6 The Chairman, some member designated by the Chairman, or a hearing officer designated by the Board, who need not be a member of the Board, shall preside. All witnesses shall be sworn by the presiding officer. The licensee, his representative, or his attorney, may cross-examine witnesses testifying against the licensee. Likewise, the Board's counsel may cross-examine witnesses testifying for defense. All exhibits introduced at such hearings shall be in duplicate.

§4.7 At all such hearings the testimony shall be recorded stenographically or otherwise. At the request of any party or person, and upon payment of the cost thereof by such party or person, the Board shall cause a full transcript of the proceedings to be prepared and shall furnish a copy thereof to such party or person. In cases where no request for a full transcript is made, the Board shall prepare a resume of the evidence.

§4.8 Whenever the Board enters a finding of guilty and orders the suspension of a license or whenever the Board accepts a plea of "guilty" or "nolo contendere" and orders a suspension of a license, it may include in the order a provision making it possible for the licensee to pay a penalty in lieu of the suspension. In addition, the Board may authorize the Director to advise any licensee desiring to enter a plea of "guilty" or "nolo contendere" of the amount of the penalty which such licensee would be permitted to pay in lieu of suspension of his license. The Board shall be bound by written statements by the Director relating to the amount of the penalty, but may set a lesser amount than that specified by such officer.

§4.9 In fixing the amount of a penalty, the Board shall take into consideration the following factors: the severity of the offense, the extent to which the

Substantive Provisions
LAC 2:17:11 Volume Discounts

11.1* The volume discounts herein established shall remain in effect unless modified, amended or repealed by the Board.

11.2 Licensed processors and licensed distributors are hereby authorized to give volume discounts to qualified licensed non-processing retailers in accordance with the following discount schedules:

Fluid Milk Products Average Monthly Purchases From All Suppliers	Volume Discount Rate
$1,000.00 to $1,500.00	3%
$1,500.01 to $2,500.00	4%
$2,500.01 to $3,500.00	5%
$3,500.01 to $4,500.00	6%
$4,500.01 and over	7%

Frozen Dessert Products Annual Purchases From All Suppliers	Volume Discount Rate
$ 4,000.00 - $ 6,000.00	3%
$ 6,000.01 - $ 8,000.00	4%
$ 8,000.01 - $11,000.00	5%
$11,000.01 - $15,000.00	6%
$15,000.01 and over	7%

11.3 Any non-processing retailer desiring to be declared eligible by the Board for a volume discount shall submit an application on a form to be supplied by the Board which application shall contain among other things the average monthly purchases of fluid milk products and/or the annual purchases of frozen dessert products which application shall be subject to verification by the Board.

The Board shall publish a list of qualified non-processing retailers showing the rate of volume discount for which each non-processing retailer is qualified under this regulation.

11.4 Average monthly purchases for fluid milk products shall be determined in the following manner:

A. Average monthly purchases shall be computed by totaling the value of fluid milk products purchased by the non-processing retailer from each supplier during the months of August, September and October and dividing the total by three.

State of Louisiana
DAIRY STABILIZATION BOARD
". . . an antitrust enforcement agency"

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Secretary
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A. G. Magee, Jr.
Polk Tiner
–
C. James Gelpi
Director-Attorney

Assessments

12.9* Each processor shall pay his assessment when due under the Act. Processors who are delinquent in the payment of their assessment shall add to the amount due a sum equal to one percent of the amount due for each day of delinquency. In computing the amount of the assessment, frozen desserts shall be converted to milk equivalents as follows: Total milk solids non-fat times 5.79 plus total pounds of fat times 12.5. In the case of diary products processed by one processor and transferred to a second processor for resale, the assessment due in connection with Class II items is to be paid by the transferor and the assessment due in connection with Class I items is to be paid by the transferree. No processor shall be required to pay assessments on products sold outside of this state. Processors whose total annual assessments amount to less than twenty-five dollars shall be permitted to pay their assessments annually.

In the event any processor refuses or fails to obtain a license or refuses or fails to pay this assessment, the Board may, collect same from the licensed buyer of said diary products as the Agent for said processors or as a user of said products.

If this provision, any part thereof, or the application thereof is held invalid, such invalidity shall not affect other parts of this provision or other provisions of these Rules and Regulations which can be given effect without this invalidated part, and to this end this provision of this Rule and these Rules and Regulations are hereby declared severable.

*Delete Rule 12.9 as it appears on page 13 of the 1979 edition of the *Louisiana Dairy Stabilization Board Rules and Regulations* and replace with this rule which is effective September 20, 1979 and supersedes the prior rule 12.9.

§12.12 All records required by these regulations to be kept by licensees shall be kept on file by the licensees for at least twenty-four months. All such records shall be so organized and located as to facilitate examination by representatives of the Board.

§12.13 All records of transactions relating to dairy products sold to licensed nonprocessing retailers or to residents of the State of Louisiana shall be maintained in an office located within the State of Louisiana; provided, that the Director may authorize a licensee to keep such records in an office located outside the State of Louisiana if such licensee demonstrates that the keeping of such records inside the State of Louisiana would cause an unnecessary hardship on such licensee and that the auditing activities of the Board staff would not be made substantially more difficult or expensive as a result of the arrangement proposed.

LAC 2-17:13 Sales Practices
Disruptive Trade Practices

§13.1 "Unfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices are hereby declared unlawful with respect to the sale of milk and milk products." (R.S. 40:931.8A) The following trade practices are hereby declared to be disruptive trade practices:

Pricing of Dairy Products

§13.1.1 The selling or offering to sell by a retailer of any dairy products at a price which is so different from the price charged by such retailer for other competing dairy products of the same type, quality or grade that the result is to substantially lessen competition or tend to create a monopoly unless such price differential is equal to the difference in the prices paid by the retailer for the products in question.

Discrimination

§13.1.2 It shall be prohibited for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the State of Louisiana and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing herein

contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. Provided, that nothing herein contained shall prevent price changes from time to time where in response to changed conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

§13.1.3 It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

§13.1.4 It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

§13.1.5 It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

§13.1.6 It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or

receive a discrimination in price which is prohibited by this Section.

§13.1.7 Upon proof being made, at any hearing on a complaint that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made shall be upon the person charged with a violation of this Section. Provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

§13.1.8 It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of Louisiana at prices lower than those exacted by said person elsewhere in Louisiana for the purpose of destroying competition, or eliminating a competitor in such part of Louisiana or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

§13.1.9 Nothing in this rule shall prevent a cooperative association from returning to its members, producers, or consumers the whole or any part of the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Sales at Less Than Cost

§13.1.10 Any advertising, offer to sell, or sale of any merchandise, either by retailer or wholesalers, at less than cost plus any state, county or municipal sales tax that is then payable under any existing law or ordinance, with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or impairing fair competition and thus injuring public welfare, is unfair competition and contrary to and violative of public policy as expressed in Louisiana law, where the result of such

advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create monopoly in any line of commerce.

Discounts, Gifts, Loans, Etc.

§13.1.11 No processor, distributor or any agent thereof shall give or offer to give directly or indirectly and no processor, distributor, or retailer or any agent thereof shall receive or offer to receive directly or indirectly anything of apparent present or prospective value with the intent or the effect of influencing the recipient in his business relationship with the donor or offeror.

§13.1.12 Upon proof being made at any hearing on a complaint of the giving or offering to give directly or indirectly, or receiving or offering to receive directly or indirectly anything of apparent present or prospective value, the burden of rebutting the prima facie case thus made shall be upon the person charged with a violation of this regulation.

Equipment

§13.1.13 No equipment furnished to a retailer by a frozen dessert processor or distributor shall be used for the storage or display of frozen desserts other than those sold to such retailer by such frozen dessert processors or distributors. The storage or display of products other than frozen desserts received from such processors or distributors, in such storage or display cabinet by a nonprocessing retailer shall constitute prima facie evidence of the violation of this regulation.

Signs

§13.1.14 No processor or distributor shall furnish, give, lend, sell or rent and no retailer shall accept, receive, buy or rent any signs and display materials except those advertising only the supplier's own products. Such signs and display materials shall not contain the name or product of any retailer.

Miscellaneous

§13.1.15 The selling or buying of any fluid milk product or frozen dessert by a processor, distributor or retailer in commerce to or from any person who is unlicensed or whose license has been suspended or revoked by the Board.

§13.1.16 The advertising by a processor or a distributor in a publication owned or published exclusively by one or more retailers or published exclusively for one or more retailers.

§13.1.17 Submitting false information to the Board.

§13.1.18 Extending any credit to a retailer by any processor where the retailer is more than thirty days delinquent in the payment of any account with any processor after written notice by the Board.

§13.1.19 The using, shipping, lending, borrowing or in any way the possessing of milk cases by a processor or distributor of milk cases belonging to any other processor or distributor.

§13.1.20 The giving away, throwing away, donating or the disposing in any way by a retailer of milk cases belonging to any licensed processor or distributor.

Permissible Practices

§13.2 The following trade practices are hereby declared not to be disruptive trade practices.

Advertising Novelties

§13.2.1 No person shall be deemed to be in violation of the Act or of these regulations on account of giving to any other person advertising novelties unless the nature and value of the advertising novelty is such as to justify the belief that the giver intended to use such gift to induce a nonprocessing retailer to divert business from a competitor to the giver.

Entertainment

§13.2.2 Nothing contained in either the Act or these regulations is to be interpreted as prohibiting the normal social activities of any person or the entertainment by any processor or distributor (or any processor's or distributor's officers and employees) of any customer unless the expenditure involved in such entertainment is excessive or unreasonable.

Donations

§13.2.3 Processors and distributors may make gifts of cash or equipment to hospitals, schools, and charitable institutions if, prior to the making of such gift, the donor makes written application to the Board for permission to make such a gift and obtains the written approval of the Board. A gift of cash to an institution in the amount of ten dollars or less may be made once in each calendar year without the necessity for compliance with this Section.

Samples

§13.2.4 Processors and distributors may give samples of dairy products to consumers if the following requirements are observed:

A. In the case of fluid milk products, the quantity must be limited to three fluid ounces.

B. In the case of frozen desserts, the quantity must be limited to one fluid ounce.

C. The retailer on whose premises such sampling activity takes place must have been in operation at that location for at least sixty days prior to the date on which such activity takes place.

D. Prior to engaging in sampling activities on the premises of a retailer, the processor or distributor shall notify the Board of the planned sampling activity. If such notification is by mail, it shall be given at least ten days prior to the date of the planned sampling activity; and if such notification is by telephone, it shall be given at least three days prior to such activity.

E. Notwithstanding the above provisions, processors may give homogenized milk, low fat milk, skim milk, or chocolate milk in half-pint containers or a frozen dessert sample weighing no more than three fluid ounces to persons participating in plant tours, if such products are consumed on the premises where given.

F. The giving of such samples by a processor or distributor shall not extend over a period of more than two consecutive days for each retailer and shall not occur more frequently than once per calendar quarter; provided that the giving of such samples during the month of December shall not be considered in determining whether there has been compliance with the provisions of this Subsection limiting frequency of demonstrations to one per calendar quarter.

Milk Dispensers

§13.2.5 A processor or a distributor may furnish a milk dispenser to a retailer provided the following requirements are observed:

A. The processor or distributor must have been engaged in selling dispenser milk to the retailer for at least sixty

days prior to the date on which the dispenser is furnished.

B. The period during which the dispenser is furnished must not exceed thirty days.

C. The processor or distributor must report to the Board within ten days after the date on which the dispenser is furnished to the retailer the make and serial number of the dispenser, the name and address of the retailer and the date on which the dispenser was installed.

Distribution Systems: Drop, Dock Pickup and Full Service Methods

§13.2.6 There shall be only three authorized methods of delivery in Louisiana for dairy products and they are the drop delivery method, dock pickup delivery method, and the full service delivery method (for definition of delivery methods see Section 1.2). In addition to the regulations contained in this Section, the drop delivery method, the dock pickup delivery method and the full service delivery method are subject to all other rules and regulations of this Act.

Drop Delivery Method

§13.2.7 Delivery by the processor shall be limited to the back door or refrigerated storage cooler of each retailer licensee.

§13.2.8 The retailer licensee shall assume all responsibility for servicing the dairy case and rotating the stock and no in-store service shall be allowed by the processor or independent wholesale distributor. The retailer must do his own price stamping as well as all other in-store services.

§13.2.9 The retailer licensee shall assume all responsibility for product losses. No returns shall be allowed except in the case of off-flavored milk and manufacturing defects. Authority for such replacement must be obtained from the Dairy Stabilization Board by the processor or wholesale distributor within twenty-four hours of delivery.

Dock Pickup Delivery Method

§13.2.10 Retailer licensees shall not receive credit for any returns brought back to the plant for milk picked up at the platform except in the case of off-flavored milk and manufacturing defects. Authority for such replacement must be obtained from the Dairy Stabilization Board by the processor or wholesale distributor within twenty-four hours of delivery.

§13.2.11 The retailer licensee shall receive no in-store service from the processor or wholesale distributor for milk picked up at the "dock."

Miscellaneous

§13.2.12 In the case of frozen desserts nothing contained in this Section shall prevent a processor or distributor from providing to a retailer storage cabinets and display cabinets with restriction for the storage and display of only such processor's or distributor's products, and nothing herein shall be construed to prohibit the operation of a retail outlet by a processor, or to prohibit the use by such processor, in such retail outlet of any equipment or advertising or miscellaneous property owned by such processor when such retail outlet is under the direct ownership, control and management of such processor.

§13.2.13 No person shall be deemed to be in violation of these regulations when fluid milk products are sold upon final liquidation of any business; such items are sold by an officer acting under the direction of any court; or in the case of a processor or distributor who sells or disposes of frozen desserts to a retailer who owns and provides his own refrigerated equipment for the display or storage of the products of such processor, or distributor, a differential from the list prices of such frozen desserts to such retailer is allowed, provided that in no case shall such differential exceed five percent of the applicable list price for such frozen desserts. The price(s) of similar or comparable products are made in good faith to meet competition.

LAC 2-17:14 Board Action on Contracts and Transactions Centralization Billing Prohibited

§14.1 Processors and distributors are prohibited from entering into contracts with wholesale grocers relating to centralized billing, guaranteeing payment of accounts, advertising, and other services to be performed by the wholesale grocery for the processor or distributor unless the processor or distributor has made written application to the Board for approval of such contract and has obtained the written approval of the Board.

§14.2 Upon receipt of an application for approval of such a contract, the Board may hold a hearing for the purpose of receiving evidence concerning the purpose and effect of the proposed contract. The Board shall approve the proposed contract if it finds that the contract does not violate the Act or any regulation.

PART TWO

DAIRY STABILIZATION LAW

PART TWO

DAIRY STABILIZATION LAW*

L. R. S. 40:931.1-931.19

§931.1 Findings, policies and purposes

It is hereby declared:

1. That milk is a necessary article of food for human consumption.
2. That an adequate supply of good quality dairy products at fair and reasonable prices is essential to the public health and welfare.
3. That milk is a highly perishable commodity, which is easily contaminated by harmful bacteria if not produced, processed, and distributed under the best of sanitary conditions, and if not properly refrigerated at all times.
4. That the supply of milk can neither be substantially increased nor substantially decreased from day to day.
5. That milk can be stored for only limited periods of time.
6. That the dairy industry is peculiarly susceptible to injury resulting from price wars and a variety of disruptive trade practices that flourish in the absence of effective regulation.
7. That price wars and disruptive trade practices in the dairy industry tend to cause financial ruin for dairy farmers and for locally-owned processors and distributors, regardless of how efficient and well managed they might be.
8. That the production, processing, packaging and distribution of good quality dairy products requires skilled and properly trained personnel and also requires substantial investments in expensive equipment, facilities, and other items.
9. That price wars and disruptive trade practices in the dairy industry weaken the financial condition of dairy farmers, processors and distributors, tend to lessen thei. ability to employ the skilled and properly trained personnel required for their operations, and tend to postpone construction and purchases of needed equipment and repairs of facilities.
10. That failure to provide effective regulation of the Louisiana dairy industry will lead to a resumption of unfair methods of competition that once existed in the Louisiana dairy industry, will result in the

*the *text* of the law as it appears here is a verbatim copy, but some explanatory *titles* have been added for the reader's convenience.

economic destruction of many dairy farmers, of independent dairy processors and of many distributors, and will tend to create a monopoly in the processing and distribution of milk and dairy products.

11. That recent developments have made it less feasible to move milk to Louisiana from areas of heavy production and have created the possibility that milk shortages will become a reality in the United States in the foreseeable future.

12. That the consumers of this State need to be protected against excessive prices on milk and dairy products, particularly during periods when such items are in short supply.

13. That the citizens of this State will be benefited by a regulatory program that is designated to stabilize the Louisiana dairy industry in order to assure an adequate supply of milk and dairy products at fair and reasonable prices.

14. That monopoly, disruptive trade practices, and unfair methods of competition should be prohibited in the Louisiana dairy industry.

15. That consumers should be protected against inadequate supplies of milk and dairy products and against excessive prices for milk and dairy products.

16. That dairy farmers and independent processors and distributors should be encouraged to make necessary investments and hire needed personnel, and that conditions should be created that would permit reasonably efficient processors and dairy farmers to remain in business.

17. That an effective program of regulation for the Louisiana dairy industry should be established in order to eliminate speculation and waste, to assure a continued supply of high quality dairy products, and to enable dairy farmers, processors and distributors to borrow funds required for their operations.

§931.2 Definitions

As used in this Subpart, unless the context otherwise requires:

1. "Milk" means the lacteal secretion of one or more cows (including such secretions when raw, cooled, pasteurized, standardized, homogenized, recombined, or concentrated) which meets applicable requirements of the State Health Officer.

2. "Bulk Milk" means milk which has not yet been placed in the container in which the product will be offered for sale to consumers, retailers or institutions.

3. "Commissioner" means the Commissioner of Agriculture of the State of Louisiana.

4. "Person" means any individual, partnership, corporation, cooperative association, governmental agency, or other business entity.

5. "Dairy Farmer" means any person who produces bulk milk for sale to a processor. The term "dairy farmer" is used interchangeably with "milk producer."

6. "Processor" means a person who processes one or more dairy products or a person who purchases bulk milk from a dairy farmer for resale to a person who processes dairy products, or a person who purchases bulk milk from anyone for resale to a person who processes dairy products. The term "processor" does not include a person who purchases ice cream mix or ice milk mix and whose processing activities are limited to converting such mix into a dairy product, all the sales of which are then made by such person to consumers at retail on premises where such processing activities take place.

7. "Distributor" means a person, other than a processor, who sells dairy products to one or more retail (home delivery) routes or to retailers, or to both.

8. "Retailer" means any person who is engaged in transferring title to dairy products to consumers at a fixed place of business located in this state.

9. "Supplier" means a processor or a distributor.

10. "Dairy product" means any of the following:

    a. Homogenized milk, regular milk, pasteurized milk, special milk, buttermilk, cottage cheese, creole cream cheese, yogurt, flavored milk, flavored milk drink, skim milk, low-fat milk, fluid cream, concentrated milk, ice cream, fruit ice cream, nut ice cream, ice milk, malt ice milk, malt ice cream, French ice cream, milk sherbets, mellorine, olarine, sherine, and the mix from which any such product is made.

    b. Any product which contains milk solids not fat, butterfat, or a milk derivative, and which is manufactured in the semblance of one of the products listed in the preceding subparagraph, provided, however, that the term "dairy products" shall not include butter, cheese (other than cottage cheese or creole cream cheese), nonfat dry milk, skim condensed milk, whole condensed milk, or sweetened condensed milk.

11. "Marketwide pool" means that arrangement under which the same blend price is received by all dairy farmers supplying milk of equiva-

lent butterfat content to those processors who are fully regulated by the same production stabilization plan.

12. "Handler pool" means that arrangement under which the same blend price is received by all dairy farmers supplying milk of equivalent butterfat content to a processor.

13. "Production Marketing Area" means that area within which minimum prices established by the commissioner shall be uniform.

14. "Representative processors" means two large processors, two medium size processors, and two small processors selected by the board in accordance with any fair and reasonable procedure.

15. "Institution" means a school, hospital, state agency, religious organization, charitable organization, or nursing home.

16. "Board" means the "Dairy Stabilization Board."

17. "Cooperative" or "Co-op" means any organization that meets the requirements of R.S. 3:131-149 and whose members are all dairy farmers.

18. "Blend price" means the price received by the dairy farmer in payment for his bulk milk, which price reflects the manner in which the bulk milk was utilized either by the processor to whom the bulk milk was sold (handler pool) or by all processors regulated by the same production stabilization plan (marketwide pool).

19. Repealed by Acts 1976, No. 695 section 2.

20. "Dairy farmer-processor" means a person who is both a dairy farmer and a processor. For the purposes of the subpart, a dairy farmer-processor is a dairy farmer in any sale of bulk milk produced by him to a processor, and is a processor in any processing, manufacturing, or sale of dairy products, or in any receipt of bulk milk from a source other than his own production.

§931.3 Production marketing areas

The Commissioner shall establish production marketing areas, shall describe the territorial extent thereof, and shall designate the same by name or number. The commissioner may increase or decrease the number of production marketing areas, combine two or more production marketing areas, or alter the boundaries of such areas. In exercising the authority granted by this section, the Commissioner shall take into consideration the historical conditions affecting the production, distribution and sale of bulk milk and dairy products in such areas, the need for establishing area boundaries in a manner which will facilitate cooperation between the Commissioner and federal authorities engaged in regulating prices paid by processors for bulk milk, and all other factors necessary to effectuate the purposes and policies of this subpart. Nothing contained

in this subpart shall prevent the Commissioner from including the entire state in one production marketing area.

§931.4 Production stabilization plans

A. Commissioner issued production stabilization plans

The Commissioner shall issue for each production marketing area a production stabilization plan that shall provide comprehensive regulation of the marketing of bulk milk by dairy farmers and the acquisition of bulk milk by processors. Each production stabilization plan issued by the Commissioner shall provide the means for determining which such plan is applicable to the bulk milk purchases of a processor engaged in selling dairy products in two or more production marketing areas. The applicability of any such plan to bulk milk purchases by a processor from a particular dairy farmer shall in no way be dependent upon the location of the sellers dairy farm nor upon the location at which title passes.

Any production stabilization plan issued by the Commission may provide for a classified pricing system predicated upon utilization, and may provide for a market-wide pooling arrangement or a handler pooling arrangement.

Any production stabilization plan may also contain provisions establishing the prices payable by a processor for bulk milk purchased from sources other than dairy farmers and may contain such other provisions as are necessary and appropriate in order to insure that prices paid for butterfat and milk solids not fat (whether in the form in bulk milk or otherwise) shall be uniform for all processors whose bulk milk purchases are regulated by same production stabilization plan.

If the Commissioner issues a production stabilization plan containing a market-wide pooling arrangement, the plan may require that milk produced by dairy farmer-processors be included in such pooling arrangement.

Any production stabilization plan may provide for price adjustments based upon the butterfat content of the bulk milk, the location where received, the location of the plant to which a portion of the bulk milk is transferred or diverted by the processor from the plant where such bulk milk is normally utilized, and other such factors for which price adjustments are now provided in 7 U.S.C. 608 (c).

B. Minimum prices to milk producers.

1. Within sixty days following the effective date of this act, the Commissioner shall call a public hearing to consider the establishment of an economic pricing formula for determining the minimum prices payable to milk producers for milk used as Class I milk. The objective of the formula shall be to insure that the minimum prices in each milk marketing area within the state shall be beneficial to the public

interest, protect the dairy industry of the state, and insure a sufficient quantity of pure and wholesome milk for the inhabitants of this state.

2. In establishing the formula, the Commissioner shall give consideration to those economic indices that will reflect changes in each of the following categories and such others as the Commissioner may deem relevant: the quantity of fluid milk produced and disposed of; ability and willingness of consumers to buy; cost factors in producing milk; alternative opportunities for milk producers; and indexes of manufacturing milk. The formula shall be designed to bring about such automatic changes in minimum milk producer Class I prices as are justified by changing conditions, without the requirement of public hearings before each such change.

3. Within thirty days after completion of the public hearing, the Commissioner shall recommend an economic pricing formula for pricing of Class I milk designed to accomplish the objectives stated in this section. This proposed formula shall be presented to the milk producers who regularly supply milk in each marketing area, to be voted upon in separate referenda to be held not more than thirty days following the announcement by the Commissioner of his recommended formula. If two-thirds or more of the producers voting in a marketing area approve the formula, it shall become the effective method of pricing milk to producers for Class I sales in that marketing area, and the prices as determined by the formula shall be the minimum prices to be paid to milk producers by processors or handlers, distributors or bulk milk handlers for milk used as Class I milk.

4. If the economic pricing formula for Class I milk is adopted in any marketing area and the percentage change in the average of the three indices reflecting cost of production, (namely, index of prices paid by farmers in the United States; index of prices paid for 16% dairy ration in Louisiana; and index of farm wage rates in Louisiana) deviates from the percentage change in the Class I price in that marketing area, as determined by the formula, by 6.0 or more percentage points, the Commissioner shall call a hearing, within thirty days, to review the operation of the formula. Within thirty days after completion of the public hearing, the Commissioner shall recommend appropriate amendments to the economic pricing formula. These amendments shall be submitted to the milk producers in the marketing area to be voted upon in a referendum to be held within thirty days following the announcement by the Commissioner of his proposed amendments. If two-thirds or more of the producers voting in the marketing area approve amendments they shall be adopted and utilized in that area.

5. If the economic pricing formula for Class I milk is adopted, and fifty percent or more of the milk producers who regularly supply milk to a milk marketing area petition, in writing, for a hearing, the Commissioner shall call a public hearing within 30 days, to review the opera-

tion of the formula and to consider amendments thereto. Within thirty days following completion of the public hearing the Commissioner shall recommend appropriate amendments to the economic pricing formula. These amendments shall be submitted to the milk producers in the marketing area to be voted upon in a referendum to be held within thirty days following announcement by the Commissioner of his proposed amendments. If two-thirds or more of the producers voting in the marketing area approve the amendments they shall be adopted and utilized in that area.

6. Whenever the Commissioner finds that the milk producer Class I prices resulting from the utilization of the formula do not tend to effectuate the purposes of this section, he may suspend the operation of the formula for a period of not more than ninety days and may establish during such period those minimum prices which will tend to effectuate the purposes of this section. When the period of suspension terminates, the minimum milk producer prices for Class I milk shall again be those resulting from the utilization of the formula. Once the operation of the formula has been suspended, the Commissioner may not suspend the operation of the formula again until at least twelve months have elapsed since the end of the period of suspension. Nothing contained in this subparagraph shall prevent the revision of the formula during the period when its operation is suspended.

7. If fifty percent or more of the milk producers who regularly supply milk to a milk marketing area petition in writing to rescind the economic pricing formula for Class I milk, the Commissioner shall, within thirty days, call a referendum and submit this proposal to the milk producers who regularly supply milk in said marketing area. If a majority of those voting in such referendum vote to rescind the economic pricing formula, its use as a method of establishing minimum prices shall be terminated.

8. If the economic pricing formula for Class 1 milk provided for in this section is not adopted or is rescinded by vote of the producers in any marketing area, the Commissioner shall, within thirty days following the referendum, call a public hearing to consider the establishment of minimum prices to be paid to milk producers for milk to be used as Class I milk. Within thirty days following the completion of the public hearing, the Commissioner shall, recommend minimum prices to be paid to milk producers for milk used as Class I milk in said marketing area. These prices shall be voted upon by milk producers regularly supplying milk in said marketing area in a referendum to be held within thirty days following the announcement by the Commissioner of his recommendations. If two-thirds or more of the producers voting in a marketing area approve the prices, the Commissioner shall, require payment of such appropriate minimum prices for milk in said marketing area.

9. Upon written request of fifty percent or more of the milk producers who regularly supply milk to a milk marketing area, the Commissioner shall, within thirty days, call a public hearing to review minimum prices established under the provisions of subparagraph (8) of this section. Within thirty days following completion of the public hearing, the Commissioner shall, recommend appropriate adjustments to the minimum price in that area. These proposed prices shall be submitted to the milk producers in that marketing area to be voted upon in a referendum to be held within thirty days following the announcement by the Commissioner of his recommendations. If two-thirds or more of the producers voting in said marketing area approve the prices, the Commissioner shall require payment of such appropriate minimum prices in said marketing area.

10. Classifications for milk other than Class I, and minimum prices to be paid to milk producers for milk to be used in such classifications shall be established by the Commissioner, subject to the approval of the producers in accordance with the following procedures:

    a. Upon written request of fifty percent or more of the milk producers who regularly supply milk to a milk marketing area, the Commissioner shall call a public hearing within thirty days to consider the establishment of appropriate classifications and minimum prices for milk other than Class I.

    b. Within thirty days following the completion of the public hearing, the Commissioner shall recommend appropriate classifications and minimum prices to be paid to milk producers for sale of milk other than Class I in said marketing area. In establishing the minimum prices, the Commissioner shall take into consideration the competitive prices paid to producers in other states or regions for milk other than Class I milk, the cost of alternative supplies from other states or regions of milk for similar use and classification; and other appropriate factors affecting the production and sale of milk in the area.

    c. These proposed classifications and minimum prices shall be voted upon by milk producers regularly supplying milk in said marketing area in a referendum to be held within thirty days following the announcement by the Commissioner of his recommendations. If two-thirds of the producers voting in a marketing area approve the classifications and the minimum prices, the Commissioner shall adopt the classifications and shall require payment of minimum prices in said marketing area.

11. In any public hearing held pursuant to this section, all interested persons shall be given reasonable opportunity to be heard.

    If fifty percent or more of the milk producers who regularly supply milk to a marketing area petition in writing to terminate the marketing

order in its entirety, the Commissioner shall within thirty days, call a referendum and submit this proposal to the milk producers who regularly supply milk in the marketing area. If two-thirds of those voting in such referendum vote to terminate the order in its entirety, its use shall be terminated effective the last day of the month in which the referendum is conducted.

C. Additional provisions of production stabilization plan

Each production stabilization plan shall contain such additional provisions as are required in order to achieve the objectives of this subpart, including, but not limited to provisions relating to the following:

1. Records to be kept by processors;
2. Reports to be submitted by processors;
3. The provision of marketing services to dairy farmers who are not members of a cooperative and the financing of such activities;
4. The establishment and transfer of individual bases in accordance with any reasonable plan including, but not limited to, a Class I base plan;
5. A provision for increasing in all production marketing areas of the prices established pursuant to this section to the level of the prices established pursuant to a federal milk marketing order having in its marketing area one or more parishes of the State of Louisiana.

D. Cooperation with Secretary of Agriculture of the United States

The Commissioner is hereby authorized to cooperate with the Secretary of Agriculture of the United States in the manner provided in 7 U.S.C. 610 (i) and in other appropriate ways.

E. Commissioner's powers of suspension

Whenever the Commissioner finds that any production stabilization plan or any provision thereof obstructs or does not tend to effectuate the purposes of this subpart, he shall suspend the operation of such plan or such provision thereof, provided, however, that the Commissioner's powers of suspension are limited by the terms of Subsection B (6) of this section. However, the Commissioner is prohibited from taking any suspensive action involving one or more provisions of the production stabilization plan if the effect thereof will be to render such plan so ineffective as not to be a production stabilization plan within the meaning of this subpart. If the Commissioner suspends a production stabilization plan in its entirety, such suspension shall not become effective unless approved by a majority of the affected dairy farmers who vote in a referendum arranged by the Commissioner.

F. Changes in prices

The Commissioner shall take such measures as are reasonably necessary to assure that changes in bulk milk prices and changes in the prices established by the Board occur simultaneously.

G. Production stabilization plan considered as a "rule"

Each production stabilization plan adopted pursuant to this section shall be considered a "rule" as that term is defined in R.S. 49:951 (6) and the adoption, amendment, and judicial review of such plans shall be in accordance with the provisions of the Administrative Procedure Act (R.S. 49:951 et seq.) relating to rules and rule-making. The revision of any provision of a production stabilization plan shall be accomplished only by the amendment of such plan. Any suspensive action taken by the Commissioner pursuant to Subsection F of this section and any action taken by the Commissioner pursuant to the third paragraph of Subsection B of this section shall be deemed an "emergency rule" as that term is used in R.S. 49:953(B), but the Commissioner shall not be required to find that any such action is required by an imminent peril to the public health, safety, or welfare.

H. Cooperative associations

Nothing contained in this subpart shall be construed to prevent a cooperative association engaged in making collective sales or marketing of milk or milk products for its dairy farmer members from blending the net proceeds of all of its sales and making distribution thereof to its producers in accordance with the membership-marketing contract between the association and its dairy farmer members, provided that no sale of milk by a cooperative association to a processor, distributor, retailer or consumer shall be made at less than the applicable minimum prices established pursuant to this subpart.

Whenever pursuant to the provisions of this subpart the Commissioner is required to determine the approval or disapproval of dairy farmers with respect to the issuance of marketing orders, amendments thereto or suspension thereof, the Commissioner shall consider the approval or disapproval or the vote by a cooperative association of dairy farmers as the approval or disapproval or vote of the dairy farmers who are members of such cooperative association and eligible to vote in the referendum. The Commissioner shall establish reasonable and appropriate rules for determining the eligibility of a producer or producers to vote in any referendum.

§931.5 Sales of dairy products not subject to price regulation

Sales of all dairy products covered by this Subpart by retailers, distributors, and processors shall not be subject to price regulation; in no event shall the Dairy Stabilization Board have power or authority to regulate or establish wholesale or retail prices; provided that any such sales shall be subject to the condition of open market competition in compliance with the disruptive trade practice provisions of this Subpart.

§931.6 Dairy Stabilization Board

A. Creation of Dairy Stabilization Board

There is hereby created the Dairy Stabilization Board to be composed of eight members as follows: the Governor shall appoint two milk producers, one

wholesale grocer, one processor, one retailer, and three consumers. No consumer member shall be engaged in producing, processing, or selling dairy products nor have a personal economic interest in any person who is so engaged.

B. Terms of Officers of Dairy Stabilization Board

The term of office of the board members first appointed by the Governor shall be as follows: two members, one year, ending August 1, 1977; two members, two years, ending on August 1, 1978; and four members, three years, ending on August 1, 1979. The terms of all members appointed upon the expiration of the term of each of the first members appointed, and the term of the wholesale grocer, shall be for three years. In making the initial appointments, the Governor shall, consistent with this Section, designate the term of office to be served by each appointee. Vacancies shall be filled in the manner of original appointment.

§931.7 Compensation, officers, quorum, staff

A. Compensation, officers, quorum

The members of the Board shall receive a per diem of thirty dollars for each day spent in attending hearings held by the Board and thirty dollars per day for each day spent in attending meetings of the Board or in performing such duties as may be required of them by law or by the directives or instructions of the Board, and they shall also receive reimbursement for expenses incurred in attending such hearings or meetings or in performing such duties; provided, however, that no member shall receive per diem and expenses for more than twelve days per calendar year spent in attending meetings of the Board. In applying the foregoing limitation, days spent in attending hearings held by the Board or in performing such duties as may be required of them by law or by the directives or instructions of the Board are not to be counted. The members of the Board shall elect a chairman, a vice-chairman, and a secretary at the first meeting of the Board and annually thereafter at the first meeting held by the Board after August 1 of each year. The date, time, and place of the first meeting shall be fixed by the Governor. Four members of the Board shall constitute a quorum. However, hearings may be held by such smaller number of Board members as the Board may determine. For good cause, the Board may designate a hearing officer for adjudicatory proceedings, who shall conduct the hearings and who shall, at the conclusion of the hearing, present the entire record of the proceeding to the Board for disposition.

B. Staff

The Board shall employ a director and such assistants and employees, permanent and temporary, as may be necessary to carry out the duties and responsibilities of the Board, and shall determine their qualifications, duties and compensation. The Board shall employ a licensed attorney of the State of Louisiana as its legal counsel, who shall serve on a full-time or a part-time basis, and the Board may obtain the services of such additional attorneys as it deems

necessary. The Board may also contract for auditing and other technical services, whenever it determines that such services are needed.

§931.8 Disruptive trade practices

A. Unfair methods of competition

Unfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices are hereby declared unlawful with respect to the sale of milk and milk products.

B. Powers of the Board

The Board is hereby empowered and directed to prevent persons, partnerships and corporations from using unfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices in the sale of milk and milk products, and the Board, after notice and hearing, shall promulgate rules and regulations implementing the policy and purposes of this Subpart and defining with specificity acts and practices in the sale of milk and milk products which are unfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices and providing for the investigation of complaints thereunder and the enforcement thereof. Such rules and regulations so promulgated shall not be in derogation of or inconsistent with the provisions of Parts IV, VI and VIII of Chapter 1 of Title 51 of the Louisiana Revised Statutes of 1950.

C. Adoption, issuance, amendment or repeal of a "rule"

The adoption, issuance, amendment or repeal of any rule or regulation provided for in this section shall be accomplished in accord with the provisions of the Administrative Procedures Act, R.S. 49:951, et seq.

D. Cooperative associations

No handler, processor or distributor shall refuse to accept or discontinue to receive milk from a milk producer as a result of such producer's affiliation with a cooperative association or as a result of activities engaged in by such cooperative association or efforts to organize a producer association; provided this provision shall not apply to milk which is not produced in compliance with sanitary requirements of the Louisiana Health and Human Resources Administration.

E. Donations to nonprofit charitable groups permissible

Nothing contained herein shall prohibit the donation of ice cream and/or frozen desserts to nonprofit charitable groups, organizations, institutions or any other such entities.

F. Dock method of distribution defined

The dock method of distribution is defined as the distribution of milk and milk products at the processor's plant to distributors and retailers. The dock method

of distribution of milk and milk products shall not be unlawful as it applies to the provisions of this Subpart.

§931.9 Repealed by Acts 1976, No. 695, section 2

§931.10 Licenses

A. For Processors to buy bulk milk

It shall be unlawful for a processor to buy milk without being licensed as a processor by the Commissioner if such processor:

1. Operates a processing plant located within the State of Louisiana; or
2. Sells dairy products to a retailer or a distributor for resale in the State of Louisiana; or
3. Sells dairy products to consumers within the State of Louisiana.

B. For Processors selling dairy products

It shall be unlawful for a processor to sell dairy products without being licensed as a processor by the Board if such processor:

1. Operates a processing plant located within the State of Louisiana; or
2. Sells dairy products to a retailer or a distributor for resale in the State of Louisiana; or
3. Sells dairy products to consumers within the State of Louisiana.

C. For Processors with processing plants in Louisiana

A separate processor license shall be obtained for each processing plant that is located within the State of Louisiana and for each plant from which dairy products are sold to a retailer or a distributor for resale in the State of Louisiana or to consumers within the State of Louisiana.

D. For Distributors

It shall be unlawful for a distributor to sell dairy products within the State of Louisiana without being licensed as a distributor by the Board.

E. For Retailers

Each retailer now holding a retailer license issued by the Louisiana Milk Commission is hereby declared to be a retailer licensee of the Board. It shall be unlawful for any retailer not so licensed to sell dairy products without being licensed as a retailer by the Board. A separate retailer license shall be obtained for each retail establishment or unit.

F. Application for licenses

The licenses application of each processor, distributor and retailer required by this Subpart to be licensed by the Board or by the Commissioner shall be

submitted prior to November 1, 1976, or prior to engaging in the business for which the licensee is required by this section. Licenses shall remain in effect until suspended or revoked. Such licenses shall be in addition to any other licenses required by law and may not be assigned or transferred. No person licensed by the Board or by the Commissioner shall be required to pay a license fee.

G. Suspension, revocation of licenses

Licenses issued by the Board, including retailer licenses may be suspended or revoked by the Board on or after October 1, 1976, upon compliance with the requirements of Chapter 13 of Title 49 of the Louisiana Revised Statutes of 1950 if the licensee has failed to comply with this Subpart or with the regulations issued by the Board. Licenses issued to processors by the Commissioner may be suspended or revoked by the Commissioner upon compliance with the requirements of Chapter 13 of Title 49 of the Louisiana Revised Statutes if the licensee has failed to comply with this Subpart or with the regulations or the applicable production stabilization plan issued by the Commissioner. The Commissioner may, if requested by a licensee, permit the payment of a penalty in an amount to be set by the Commissioner in lieu of a license suspension. The Board may, if requested by a licensee, permit the payment of a penalty in an amount to be set by the Board in lieu of a license suspension.

§931.11 Access to records

Any authorized representative of the Board or of the Commissioner shall have access to, and may enter at all reasonable hours, all places of business operated by licensees where bulk milk or dairy products are purchased, stored, processed, manufactured, or sold, or where the licensee maintains books, papers, accounts, records, or other documents related to such activities. The Board or the Commissioner may subpoena, and any authorized representative of the Board or the Commissioner may inspect, copy, audit, any of such books, papers, records, accounts, or documents, all for the purpose of determining whether the licensee is complying with the provisions of this Subpart, and with regulations or stabilization plans issued by the Board or the Commissioner. The authority granted hereinabove shall also extend to books, papers, records, accounts, or other documents of persons doing business with licensees. Any information gained through utilization of the authority granted hereinabove in this section shall be treated as confidential and shall be used only for the administration of this Subpart; provided, that such information may be divulged by a person when called upon to testify in any adjudicatory proceeding before the Board or the Commissioner or in any court proceeding, and provided further, that nothing contained in this Subpart shall prevent the use of any information procured by the Board or the Commissioner in the compiling and dissemination of general statistical data, containing information procured from a number of licensees, and compiled in such manner as not to reveal individual information of any licensee.

§931.12 Repealed by Acts 1976, No. 695, section 2

§931.13 Assessments

A. Amount of assessment for administration and enforcement of regulations and production stabilization plans issued by Commissioner.

Louisiana Department of Agriculture
Dairy Stabilization Board
4432 Florida Boulevard
Baton Rouge, Louisiana 70806
504-922-4870

Bob Odom
Commissioner

Herbert Kramer
Chairman
Ben H. Grayson
Vice-Chairman
Vernon Toups, Jr.
Secretary

Members
Mack Abraham
Lyle Degelos
Teddy Gabb, Sr.
A. G. Magee, Jr.
Polk Tiner

C. James Gelpi
Director-Attorney

*L.R.S. 40:931.13 was amended in the 1980 session of the Legislature by Act 331, which added paragraph "D" which is as follows:

D. Assessment collection from retail purchasers.

In the event any processor refuses or fails to obtain a license or refuses or fails to pay this assessment, the commissioner may collect same from the licensed buyer of said dairy products as the agent for said processors or as a user of said products.

*The above amendment became effective September 12, 1980.

In order to obtain funds for the administration and enforcement of the regulations and production stabilization plans issued by him pursuant to this Subpart and for the administration and enforcement of that portion of this Subpart for which he is made responsible, the Commissioner shall, commencing on August 1, 1974, assess each processor licensed by the Commissioner pursuant to this Subpart one and one-half cents per hundredweight on all milk purchased under any production stabilization plan and shall assess each dairy farmer one and one-half cents per hundredweight on all milk sold to a processor regulated by any production stabilization plan.

B. Amount of assessment for adminstration and enforcement of rules and regulations issued by the Board.

In order to obtain funds for the administration and enforcement of the regulations issued by the Board pursuant to this Subpart and for the administration and enforcement of that portion of this Subpart for which the Board is made responsible, the Board shall, commencing on October 1, 1976, assess each processor licensed by it three cents per hundredweight on all milk equivalents used in the processing of dairy products.

C. Terms of payment

All assessments authorized in this Section shall be payable monthly on or before the last day of the month following the month during which they accrue.

§931.14 Revolving funds

A. Commissioner's Revolving Fund (Milk)

All assessments, penalties, and other monies received by the Commissioner pursuant to the provisions of this subpart shall be paid to the Commissioner and shall be deposited in the state treasury to the credit of a revolving fund for the use of the Commissioner as needed in the administration of the provisions of this subpart, which revolving fund is the same as that heretofore authorized by R.S. 40:940.14 and which shall be known hereafter as the Commissioner's Revolving Fund (Milk). No part of this revolving fund shall revert to the general fund of this state, and the assessments authorized in the first sentence of R.S. 40:931.13 shall be adjusted by the Commissioner in order to prevent this revolving fund from exceeding the sum of one hundred fifty thousand dollars.

B. Dairy Stabilization Board Revolving Fund

All assessments, penalities, and other monies received by the Board pursuant to the provisions of this subpart shall be paid to the Board and shall be deposited in the state treasury to the credit of a revolving fund for the use of the Board as needed in administration of the provisions of this subpart, which revolving fund shall be known as the Dairy Stabilization Board Revolving Fund. No part of this revolving fund shall revert to the general fund of this state, and the assessments authorized in the second sentence of R.S. 40:931.13 shall be adjusted by the Board in order to prevent this revolving fund from exceeding the sum of one hundred fifty thousand dollars.

§931.15 Regulation of vertical integration

The Commissioner shall be authorized to promulgate rules and regulations to control vertical integration which is the entry of food chain stores into the

dairy processing business. In addition to such rules and regulations, vertical integration shall be subject to all provisions of this subpart and the antitrust and restraint of trade laws of this state.

§931.16 Modification of Commissioner or Board action

A. Written petitions, hearings, rulings

Any person subject to an order, directive, rule, regulation or other result of the Commissioner's action or the Board's action may file a written petition with the administrative agency, stating that such order, directive, rule, regulation or other result of Commissioner or Board action, or any provision thereof, or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the agency, but no later than fifteen days after the date on which such petition is filed. After such hearing, the agency shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law. Such ruling shall be made no later than fifteen days after the date on which the hearing ends.

B. Jurisdiction to review ruling; 19th Judicial District Court

The Nineteenth Judicial District Court has jurisdiction to review such ruling, provided a suit for such purpose is filed within twenty days from the date of the entry of such ruling. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Commissioner or to the Board with directions either: (1) to make such rulings as the court shall determine to be in accordance with law; or (2) to take such further proceedings as, in its opinion, the law requires.

C. Venue for suits against Commissioner or Board

No suit of any kind may be filed against the Commissioner or the Board at any place other than the Parish of East Baton Rouge. In suits against the Commissioner, all services shall be made on the Commissioner or on any employee of the Commissioner located at the Commissioner's main office. In suits against the Board, all service shall be made on the director or on any Board employee located at the Board's main office.

§931.17 Transition

A. Minimum retail prices repealed

The regulations and price codes heretofore adopted by the Louisiana Milk Commission shall, unless sooner repealed by the Board, continue in full force and effect until June 1, 1975, except as modified by the following:

All minimum retail prices set forth in such price codes, both out-of-store and home delivered are hereby repealed.

B. Enforcement and administration of regulations and price codes.

The said regulations and price codes, modified in accordance with the preceding subsection, shall be enforced and administered by the Louisiana Milk Commission until October 1, 1974. The said regulations and price codes modified in accordance with the preceding section, shall, until repealed by the Board, be enforced and administered thereafter by the Board.

C. Collection of assessments

The Louisiana Milk Commission shall, in accordance with R. S. 40:940.21 and R. S. 40:940.22, collect all assessments in connection with products processed prior to August 1, 1974, but shall collect no assessments that accrue thereafter.

D. Transfer of funds

Upon receipt of a request from the Board, the State Treasurer shall transfer from the Louisiana Milk Commission Revolving Fund to the Dairy Stabilization Board Revolving Fund (established by R.S. 40:931.13(8)) all sums in excess of fifty thousand dollars. On September 30, 1974, the following shall be transferred to the Board; the balance of the Louisiana Milk Commission Revolving Fund, all sums on deposit in banks to the account of the Louisiana Milk Commission, all accounts payable and accounts receivable of the Louisiana Milk Commission, all furniture, fixtures, equipment, supplies and other assets belonging to the Louisiana Milk Commission.

E. Suspension, revocation of licenses

The authority of the Board to suspend or revoke licenses shall extend to those situations in which the licensee violates Subpart D of Part VII of Chapter 4 of Title 40 of the Revised Statutes or the regulations or price codes of the Louisiana Milk Commission prior to October 1, 1974; and the Board is authorized to make a decision in any adjudicatory proceeding commenced by the executive secretary of the Louisiana Milk Commission prior to October 1, 1974, and to take such other actions in connection therewith as could have been taken by the Louisiana Milk Commission pursuant to Subpart D of Part VII of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950 and that agency's regulations.

F. Ceasing operations of Louisiana Milk Commission

The Louisiana Milk Commission shall cease all operations at the close of business on September 30, 1974, and the terms of all of its members shall expire at that time.

G. Conflict of laws

In the event of any conflict between the provisions of the Orderly Milk Marketing Law (La. R. S. 40:940.1 through 40:940.23) and the provisions of this subpart, the latter shall prevail.

§931.18 Penalties for violation

A. Fines, temporary restraining order, preliminary injunction, permanent injunction.

Violation of this subpart shall be a misdemeanor, punishable by a fine not to exceed five hundred dollars in the discretion of the court. Each day's violation shall constitute a separate offense. In addition to the penalties herein provided, violation of this subpart may be enjoined at the suit of any person aggrieved or about to be aggrieved thereby, or at the suit of the Commissioner or the Board. No showing of irreparable injury shall be required in any suit for a temporary restraining order, preliminary injunction or permanent injunction filed by the Commissioner or the Board.

B. Injunction, damages, costs, attorney's fees

In addition to the penalties provided in this subpart, any person who shall be injured in business or property by reason of any other person's violation of any of the provisions of this subpart may intervene in the suit for injunction instituted pursuant to this paragraph against such other person, or may sue in a separate action such other person in the courts of competent jurisdiction, and shall recover three times the actual damages sustained as a result of such violation, together with the costs of the suit and reasonable attorneys fees. In addition to the above remedy any such person may in such courts and places sue to enjoin the violation of any of the provisions of this subpart.

§931.19 Construction

The authority of the Commissioner to regulate bulk milk and of the Board to regulate dairy products moving in interstate commerce shall be construed to be as great as, but not to exceed, the limits imposed by the United States Constitution.

Sub-part D. Orderly Milk Marketing section 940.1 to 940.23 Repealed by Acts 1974, No. 31 section 1.

Section 2. Paragraph (19) of Section 931.2 and Sections 931.9 and 931.12, all of Title 40 of the Louisiana Revised Statutes of 1950 are hereby repealed in their entirety.

Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of the Act are hereby declared severable.

Section 4. All laws or parts of laws in conflict herewith are hereby repealed.

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APPENDIX F

POST TRIAL AMENDMENT TO LA. REV. STAT. § 931.13

La. Rev. Stat. § 931.13, as amended by 1980 La. Acts, No. 331:

D. In the event any processor refuses or fails to obtain a license or refuses or fails to pay this assessment, the commissioner may collect same from the licensed buyer of said dairy products as the agent for said processors or as a user of said products.

APPENDIX G

REPORT OF EXCEPTIONS TO FINDINGS AND RECOMMENDATIONS OF THE GOVERNOR'S MILK STUDY COMMITTEE

We are in agreement with that part of the Committee's report pertaining to the State's establishing prices to be paid to dairy farmers. For many reasons, we believe it is essential that the State of Louisiana regulate prices in this area. The use of the Alexander formula or a similar one would be the most effective and economical way to carry out this function. Such a formula would permit producer prices to be adjusted quickly and flexibly when conditions as measured by the indices fluctuate. No longer would farmers have to depend on a lengthy and costly public hearing prior to receiving an adjustment in their prices. Hearings would be held only to consider proposed changes in the formula.

We strongly disagree with the position of the Commitee relative to State pricing of milk and milk products at the wholesale and retail levels. The majority report simply reaffirms the existing policy. To put it bluntly – – it is the same old package tied with a new ribbon.

Throughout the months of meetings held by the Governor's Milk Study Committee, an attempt was made to find some middle ground with processors and retailers on these issues.

They were unwilling to make any major compromises or concessions; rather they insisted on a continuation of the same policy that gave rise to the controversy. It has been the views of some members of the Committee that the controversy would fade away if the news media and persons in public office refrained for voicing criticism. However, we feel that the pricing of milk by the State of Louisiana is a public policy which should be open to the widest possible public debate and discussion.

We do not believe it is in the interest of the citizens of Louisiana for the State to establish wholesale and retail prices for fluid milk and milk products. At the present time, approximately 14 states establish wholesale prices to be charged by processors and some 13 states fix retail or out-of-store prices. In out opinion State pricing discourages competition and promotes unduly high prices especially at the retail level. The only competition now in existence at the processor and retail levels on milk is brand competition with the exception of minor differentials at the retail level on a half gallon of fluid milk in cardboard containers.

In our judgment the State regulation of wholesale prices has resulted in a situation wherein prices must reflect the least efficient manner of doing business at the processor level. Thus, the practice serves to protect and to perpetuate inefficiency and to discourage or to prevent serious attempts to evaluate procedures and to eliminate inefficiency in processing plants.

State pricing of milk and milk products at the retail level simply cannot be justified. Throughout the course of the hearings, grocery retailers testified that they did not want to compete in the marketplace with milk. Yet, these same grocers were willing to compete in other essential basic food products.

We do not believe that the State should completely abandon the regulation of milk at the wholesale and retail levels. Experience in other states, most notably Georgia, has shown that some processing plants will move to monopolize the industry unless prevented from doing so by regulation. It is essential that Louisiana enact regulations to insure that open and fair competition takes place in the milk industry. To that end, we would suggest legislation that would:

A) Prohibit processing plants from awarding cash and/or other goods and services to retail outlets in order to capture the outlet's dairy business or to achieve a dominant position in the dairy case.

B) Prohibit retail outlets from soliciting or accepting anything of value from employees and/or officers of milk processing plants or from anyone associated with the dairy industry. If this is not done, drivers and salesman may be required by retail outlets to "pay" for a dominant position in the dairy case.

C) Empower the milk board or some similar entity, or the Commissioner of Agriculture, with the authority to make administrative rules and regulations to carry out the functions outlined in points "A" and "B" above.

The three points noted above are the key to promoting fair competition in the processing and marketing of milk and milk products. Unless Louisiana is willing to enforce open competition at these two levels, it is safe to assume that we will witness the same developments that have occurred in other states, notably Georgia (see page 16-A of the *Atlanta Journal and Constitution*, June 10, 1973). In a 1966 report to the President, the Food Market Commission noted that processors in some states would pick up the cost of advertising for a retail outlet, donate milk cases or other equipment to such outlets, present automobiles and other expensive gifts to store managers, and make loans to food stores in order to secure favorable treatment.

It is not unreasonable to expect that in the absence of certain restraints several major processing plants would achieve an unhealthy domination of the milk market in the State. In our opinion, it is entirely in the public interest for the State of Louisiana to prohibit collusion between processors and retailers that would be detrimental not only to the milk industry but to the general population.

We also feel it is essential to regulate the further growth of multi-state dairy co-ops or large intrastate co-ops in Louisiana. Dairy co-ops have been and will continue to be important to farmers in that such organizations afford a collective voice in the marketing of their products. But the State should prevent any one co-op or a federation of co-ops from gaining control of

a major portion of the raw milk produced in this State. Accordingly, we propose the following recommendations as a means of preventing the establishment of such a monopoly:

A) State anti-trust and restraint of trade laws should be examined to insure that they are adequate to curb co-ops if the need arises. Specifically, dairy co-ops should not be made exempt from anti-trust and restraint of trade prosecutions for price fixing practices.

B) Legislation should be enacted regulating the entry of co-ops into the processing phase of milk.

C) Full service contracts or similar arrangements by dairy co-ops with milk processing plants should be closely scrutinized and regulated.

D) The milk board or a similar regulatory agency should be empowered to regulate co-ops.

We believe it is also necessary for the State to regulate vertical integration. That is, the entry of food chain stores into the dairy processing business. In the *Federal Register* of July 3, 1973, the Federal Trade Commission notes: "The continued growth of food chains and their success in achieving consumer acceptance for private label milk had caused vertical integration into processing to increase sharply since the early 1960's. Vertical integration is a source of considerable market foreclosure to non-integrated daires in many local markets and it may be causing smaller and new entrant food chains in some markets to face a cost disadvantage. Although the threat of food chain

integration appears to have had a significant price effect, particularly through the wholesale and retail pricing of private label milk, *the actual integration of food chains into processing has not been associated with further intensifications of price competition.*" [emphasis in original].

Our opposition to price fixing of milk and milk products at the processor and retail levels is not based on any philosophical fixation. Quite pragmatically, we believe that conditions which gave rise to State legislation in this area no longer exist in Louisiana. We should be willing to examine the laws that have been enacted and to repeal or modify them if they are not working to the best interest of all persons. The public will accept nothing less than a complete re-evaluation of the State's role in this vital area.

One final point: Members of the Governor's Milk Study Committee have worked long and hard on this very complex subject. In our judgment the difference of opinions existing between various members of the Study Committee are based on honest convictions. We sincerely hope that this minority report will in no way be taken as a personal criticism of individual members of the Committee, or of the Committee as a whole. It is not intended for that purpose. It is intended, however, to point out what we honestly believe to be shortcomings in some of the findings and recommendations of the Committee.

/S/

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/S/

REPRESENTATIVE SAM A. LEBLANC, III

/S/

AUDREY C. GATES

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No. 80-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUISIANA DAIRY STABILIZATION BOARD,
Appellant,

versus

DAIRY FRESH CORPORATION AND
DAIRY FRESH ICE CREAM CORPORATION,
Appellees.

On Appeal from the
United States Court of Appeals
For the Fifth Circuit

MOTION TO AFFIRM

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QUESTION PRESENTED

May a state regulatory body charged with the duty of stabilizing economic activities in a state's dairy market impose an assessment and a set of restrictive economic regulations on sales of dairy products made by an out-of-state processor in an out-of-state market, simply because a domestic retailer purchases these products for importation into the state?

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No. 80-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

LOUISIANA DAIRY STABILIZATION BOARD,
Appellant,

versus

DAIRY FRESH CORPORATION and
DAIRY FRESH ICE CREAM CORPORATION,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

MOTION TO AFFIRM

Dairy Fresh Corporation and Dairy Fresh Ice Cream Corporation, appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground

that the question on which the decision of the cause depends is not sufficiently substantial to warrant plenary consideration.

STATEMENT OF THE CASE

1. Course of proceedings below.

This action was brought by the appellant, the Louisiana Dairy Stabilization Board ("the Dairy Stabilization Board"), for a declaration that its attempts to apply certain provisions of the Louisiana Dairy Stabilization Law ("the Dairy Stabilization Law"), La. R.S. 40:931, *et seq.*, and its regulations to the appellees, Dairy Fresh Corporation and Dairy Fresh Ice Cream Corporation (collectively "Dairy Fresh") are valid under the United States Constitution. Dairy Fresh counterclaimed for a declaration that the attempted application of the Dairy Stabilization Law and regulations violates both the Commerce Clause and the Due Process Clause of the United States Constitution. (R., 1-8; 21-28).

Following a trial, the district court entered Findings of Fact and Conclusions of Law holding that the attempts of the Dairy Stabilization Board to apply the Dairy Stabilization Law and regulations to the activities of Dairy Fresh violate the Commerce Clause. *Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp.*, 476 F.Supp. 416 (M.D. La., 1979). The district court found that the processing activities of Dairy Fresh occur out-

side the State of Louisiana and its transactions with Louisiana retailers are consummated outside the state. *Id.* at 419-20. Thereafter, the district court entered a judgment permanently enjoining the Dairy Stabilization Board from enforcing certain provisions of the Dairy Stabilization Law and regulations with respect to the activities that Dairy Fresh carries on outside of the State of Louisiana. (R., 262).

The decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp.*, 631 F.2d 67 (5th Cir., 1980). The court held that the attempted "application of the Louisiana Dairy Stabilization Law and regulations to these out-of-state processors based on the out-of-state sale of their products for resale in Louisiana violates the Commerce Clause of the United States Constitution . . ." *Id.* at 69.

2. Factual background.

The background of this case includes extensive prior litigation concerning the constitutionality of efforts by various Louisiana agencies to protect the economic interests of Louisiana dairy producers and processors by attempting to regulate the purchase and sale of dairy products in interstate commerce. In 1965, Schwegmann Giant Super Markets (formerly Schwegmann Bros. Giant Super Markets and hereinafter called "Schwegmann"), a Louisiana retailer, sued the predecessor of the Dairy Stabilization Board, the Louisiana Milk Commission ("the Milk Commission"),

alleging that the Milk Commission's efforts to regulate Schwegmann's out-of-state purchases of dairy products by attempting to control the prices paid for these purchases were unconstitutional. A three-judge federal court ruled in favor of Schwegmann and the decision was affirmed by this Court. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F.Supp. 1144 (M.D. La., 1973), *aff'd*, 416 U.S. 922, 94 S.Ct. 1920 (1974).

Subsequent to the decision of the Court, Schwegmann entered into an agreement with Dairy Fresh to purchase milk products in Mississippi for importation into and resale in Louisiana. When officials of the Louisiana Health & Human Resources Administration refused to issue a permit to Dairy Fresh authorizing the importation of its products for sale by Schwegmann, Schwegmann and Dairy Fresh brought suit to compel the issuance of the permit. After extensive litigation in the Louisiana courts, the state health officials were ordered to issue the required certificate. *Schwegmann Bros. Giant Super Markets v. Edwards*, 323 So.2d 810 (La., 4th Cir., 1975), *writ denied*, 326 So.2d 503 (La. 1976). Schwegmann began importing Dairy Fresh milk for resale in its stores. As the Dairy Fresh price was substantially lower than the processor prices prevailing in the regulated Louisiana market, this action resulted in lower prices to consumers and ultimately brought about an increase in price competition among the processors and retailers selling milk in the market served by Schwegmann.

3. Regulatory activities of the Dairy Stabilization Board.

In 1975 the Milk Commission was abolished and replaced by the Dairy Stabilization Board. See La. R.S. 40:931.6. The price-fixing powers of the agency were abolished, but the Dairy Stabilization Board retained authority to issue licenses, impose assessments and regulate "[u]nfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices . . . with respect to the sale of milk and milk products." La. R.S. 40:931.8.

The stated purpose of the Dairy Stabilization Law is the establishment of a "program of regulation for the Louisiana dairy industry." La. R.S. 40:931.1(17). The program includes two components. First, the Louisiana Commissioner of Agriculture ("Commissioner") is directed to establish "production marketing areas" within Louisiana and a "production stabilization plan" for each area. *See* La. R.S. 40:931.3-931.4. Second, the Dairy Stabilization Board was created and empowered to promulgate regulations to further the purposes of the Dairy Stabilization Law. La. R.S. 40:931.8. Under the statute, a majority of the members of the Dairy Stabilization Board must be persons engaged in the production, processing or sale of dairy products. La. R.S. 40:931.6. Thus, the statute was designed to permit the persons who participate in the industry to regulate themselves. *Id.*

In March, 1980, the powers exercised by the Dairy Stabilization Board were transferred to the Commissioner. The Dairy Stabilization Board continues to exist, however, in an advisory capacity to the Commissioner. The regulations of the Dairy Stabilization Board are enforceable by the Commissioner. Under the provisions accomplishing the transfer, legal proceedings instituted in the name of the Dairy Stabilization Board are continued in its name. La. R.S. 36:629(g); 36:901 *et seq.*; 36:904. To promote clarity, this motion will refer to the regulatory activities now undertaken by the Commissioner as if they were still the prerogative of the Dairy Stabilization Board.

Section 931.10(B) of the Dairy Stabilization Law makes it unlawful for a processor to sell dairy products to a retailer for resale in Louisiana without being licensed as a processor by the Dairy Stabilization Board. Additionally, each licensed processor is obligated to pay an assessment to the Dairy Stabilization Board. The assessment is based on the weight of milk equivalents used by the processor in processing its dairy products. La. R.S. 40:931.13(B) states:

> In order to obtain funds for the administration and enforcement of the regulations issued by the board pursuant to this Subpart and for the administration and enforcement of that portion of this Subpart for which the board is made responsible, the board shall,

commencing on October 1, 1976, assess each processor licensed by it three cents per hundredweight on all milk equivalents used in the processing of dairy products.

Although the Dairy Stabilization Board characterizes itself as an "antitrust enforcement agency," none of the regulations it enforces resemble the pro-competitive provisions of the Sherman Act. Instead, these regulations are designed to limit the scope of competition in the Louisiana dairy industry by imposing restrictions on the terms of sale. (R., Board Exh. 1). Some of the regulations are patterned after the Robinson-Patman Act and prohibit discrimination among customers in the sale of dairy products, but the regulations limit the terms of sale in other ways as well. (*Id.*, Regs. 13.1.1-13.1.9; 13.1.10, 13.2.13).

For instance, the regulations contain a broad limitation on sales at less than cost. (*Id.*, Reg. 13.1.10). They prohibit the offering of volume discounts without the issuance of a "volume discount eligibility certificate" to the purchasing retailer. Under the regulations and the certificates, the percentage discounts that may be granted by processors are fixed according to a uniform schedule. (*Id.*, Reg. 11.1 *et seq.*). Processors are restricted to "only three authorized methods of delivery," the drop delivery method, dock pickup delivery method, and full service delivery method. (*Id.*, Regs. 13.2.6-13.2.11).

In addition, processors are prohibited from engaging in numerous other activities, including spending "excessive" amounts in entertaining potential customers, making charitable contributions or gifts without prior approval of the Dairy Stabilization Board, using or possessing milk cases belonging to another processor, furnishing free samples except under specified conditions, furnishing signs or other equipment to retailers except under specified conditions, and entering into agreements with retailers relating to billing and services performed by the retailer without prior approval of the Dairy Stabilization Board. (*Id.*, Regs. 13.2.2; 13.2.3; 13.1.19; 13.2.4; 13.1.13-1.14; 14.1).

The Dairy Stabilization Board also enforces regulations that have the effect of limiting extensions of credit by processors to retailers. Each processor and distributor is required to specify a time for payment by customers not later than 15 days after the end of the month of delivery. All "delinquent" accounts must be reported to the Dairy Stabilization Board. In addition, processors and distributors are prohibited from extending credit to a retailer that is more than 30 days delinquent in the payment of any account to a processor, after notice of the delinquency is received from the Dairy Stabilization Board. (*Id.*, Regs. 12.6-12.8, 13.1.18).

The district court made specific findings of fact concerning the function of the Dairy Stabilization

Board. 476 F.Supp. at 418. None of these findings referred to any "antitrust" role of the agency. Instead, the district court found:

> In addition to licensing and assessment authority, the Board is empowered to enforce certain "obligations of licensees" which include such things as requirements for detailed record keeping; regulations as to required time of payment for products sold to retailers; restricted methods of delivery of goods; prohibitions against granting extensions of credit to retailers; prohibitions against spending excessive amounts for entertaining or making charitable contributions or gifts; regulations pertaining to use or possession of milk cases belonging to another processor; and regulations concerning furnishing of samples to consumers or signs to retailers. No distinction is made between in-state and out-of-state processors. *Id.*

As the district court noted, these regulatory activities would apply to out-of-state processors if the Dairy Stabilization Board had the power to regulate out-of-state transactions.

To facilitate the enforcement of its regulations, the Dairy Stabilization Board requires detailed records to be maintained by licensed processors. The applicable regulations require "such books and records . . . as are

necessary for a determination by the Board or its staff as to whether the licensee has complied with the Act, rules and regulations." (R. Board Exh. 1, Reg. 12.11). These records must be maintained for at least 24 months. Processors located outside the state are required to maintain an office within the state in order to facilitate the regulatory examination unless a waiver of this requirement is obtained. All records must be "organized . . . as to facilitate examination by representatives of the Board." (*Id.*, Regs. 12.11-12.13; 12.12).

4. Transactions between Dairy Fresh and Louisiana retailers.

Dairy Fresh Corporation is a Mississippi corporation that owns and operates a milk processing plant in Hattiesburg, Mississippi. Dairy Fresh Ice Cream Corporation is an Alabama corporation that owns and operates a frozen dessert processing plant in Greensboro, Alabama. Neither company has qualified to do business in Louisiana and neither maintains an office within the state. Dairy Fresh has no processing plant, warehouse or other building in Louisiana, solicits no business in Louisiana, maintains no salesmen in Louisiana, and has no employees who are regularly employed in the state. (R., 2; Tr., 38-39).

Dairy Fresh sells dairy products to two Louisiana retailers, Schwegmann and Delchamps, Inc. ("Delchamps"). All of these dairy products are sold and

delivered in Mississippi. Schwegmann and Delchamps transport the dairy products into Louisiana for resale at their retail stores. (R., Stipulations; Tr. 38). Under the agreements between Dairy Fresh and Schwegmann and Dairy Fresh and Delchamps, title passes in Mississippi in all the transactions between the parties. (Tr., 35, 38). Thus, the district court found that the sales occur entirely outside the State of Louisiana. It stated:

> The Court has found, as a fact, that the defendant processors completed the processing of the products here involved in states other than Louisiana, and that the sale of those products took place outside of Louisiana. The mere fact that defendants were aware of the fact that after the sale the products were to be transported into Louisiana for resale by the retailer does not subject the processing activities conducted in Mississippi to tax or assessment by the State of Louisiana. See *American Oil Company v. Neill*, 85 S.Ct. 1130, 1134 (1965). 476 F.Supp. at 419-20.

5. Holding of the district court and the court of appeals.

The decision of the district court, which was affirmed by the court of appeals, does not invalidate any provision of the Dairy Stabilization Law as written. Nor does it prevent the Dairy Stabilization Board from

pursuing any of its regulatory activities within the State of Louisiana. The decision prohibits only the attempts of the Dairy Stabilization Board to impose assessments on and limit the terms of transactions occurring entirely outside the State of Louisiana.

Thus, the district court recognized the right of the Dairy Stabilization Board to impose its regulations, including the provision calling for the payment of an assessment, to "the processing of dairy products in the State of Louisiana . . ." 476 F.Supp. at 420. However, the ruling prohibits the imposition of an assessment when "the products involved are wholly processed outside of Louisiana and are then sold and delivered by the processor to a retailer outside the State of Louisiana." *Id.* at 420. Similarly, it prevents the Dairy Stabilization Board from enforcing its regulations restricting the terms of sale and delivery of dairy products and other activities of processors outside the territorial limits of the state. *Id.* In the words of the Fifth Circuit, the Dairy Stabilization Board has "no power to project its economic regulation — at least insofar as the purpose is to protect local economic interests — to production, processing and sale of dairy products at places without the state." 561 F.2d at 69.

ARGUMENT

The appeal of the Dairy Stabilization Board does not raise any issue that is substantial enough to justify

plenary consideration by the Court. The decision of the court of appeals does not invalidate any portion of the Dairy Stabilization Law on its face. Instead, this holding merely prevents a Louisiana agency from imposing an assessment and restrictive economic regulations on transactions that are consummated entirely in a different jurisdiction. The Dairy Stabilization Board remains unfettered in its regulation of the marketing of dairy products within the State of Louisiana. Thus, the decision has the limited effect of prohibiting the extraterritorial application of the Dairy Stabilization Law.

The decision of the Fifth Circuit is consistent with the holdings of this Court that prevent a state agency from projecting its economic regulations into another jurisdiction. Under the Commerce Clause, a state may not regulate activities occurring in another state in order to ensure the "stabilization" of its own economic market. The arguments of the Dairy Stabilization Board provide no basis for the application of a rule different than that chosen by the court of appeals. Therefore, the decision should be affirmed.

A. The Dairy Stabilization Board May Not Constitutionally Impose Its Assessment Or Regulations On Transactions Occurring Entirely In A Different State.

The Dairy Stabilization Law provides for the imposition of an assessment on the *processing* of dairy

products. La. R.S. 40:931.13 permits the Dairy Stabilization Board to "assess each processor licensed by it three cents per hundredweight on all milk equivalents used in the processing of dairy products." Thus, the attempt to collect an assessment from Dairy Fresh applies to an activity occurring at processing plants located entirely outside the State of Louisiana. In addition, any attempt to regulate the terms of sale between Dairy Fresh and Schwegmann or Delchamps would relate solely to an out-of-state transaction. As the district court found, "the defendant processors completed the processing of the products here involved in states other than Louisiana, and . . . the sale of those products took place outside of Louisiana." 476 F.Supp. at 419.

The attempt of the Dairy Stabilization Board to project its economic regulations into other jurisdictions is invalid under the settled jurisprudence of this Court. For instance, in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497 (1935), the Court invalidated an attempt by New York to preclude sales of milk within the state when the milk was purchased from a processor outside the state at prices lower than those prescribed under the New York regulatory scheme. In invalidating the provision, the Court started from the proposition that a state cannot, consistent with the Commerce Clause, project its economic regulations into another jurisdiction. It said: "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521, 55

S.Ct. at 499. Thus, the fundamental premise relied on by the Court was the principle that a state may not engage in extraterritorial regulation.

In addition, the Court determined that the New York regulatory scheme was unconstitutional because it had the effect of placing a duty on the importation of milk into the state. The Court stated:

> Imposts or duties upon commerce with other countries, by express prohibition of the Constitution, is beyond the power of a state, "except what may be absolutely necessary for executing its inspection Laws." Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of Congress. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." (Citations omitted). *Id.* at 521-23, 55 S.Ct. at 500.

The decision in *Baldwin* was followed in *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F.Supp. 1144 (M.D. La., 1973), *aff'd* 416 U.S. 922, 94 S.Ct. 1920 (1974), where a three-judge court held that the attempt of the Louisiana Milk Commission to regulate out-of-state transactions in dairy product was unconstitutional. The decision was affirmed b.

this Court. The Milk Commission had attempted to fix the minimum price of purchases of dairy products by Schwegmann from an out-of-state supplier. The three-judge court held that this attempt to extend regulatory authority outside the state violated the Commerce Clause. It said:

> [W]e further hold that even though Louisiana has the power and the right to regulate the price at which milk products are sold in Louisiana, it has no power to project its regulation into Tennessee by regulating the price to be paid in that state for milk acquired there. *Id.* at 1156.

The court found no particular part of the Orderly Milk Marketing Law to be *per se* unconstitutional, but held that the application of the act to out-of-state transactions was illegal. It stated: "[W]e are of the opinion that the interpretation of the authority granted by that statute is unconstitutional in respect to regulation of purchases made out of state." *Id.*

The *Baldwin* and *Schwegmann* decisions are controlling of the issue in this case. The attempt to regulate the out-of-state sales is an effort to project the authority of the Dairy Stabilization Board into Mississippi. In addition, the assessment is the equivalent of a duty of three cents per hundredweight on transactions occurring outside Louisiana. The efforts to regulate the sales of Dairy Fresh are even more objectionable than the attempts in *Baldwin* and *Schwegmann*, because the Dairy

Stabilization Board wishes to directly, rather than indirectly, assess and establish the terms of the out-of-state transactions. Therefore, the attempt to regulate and assess these sales violates the Constitution.

The attempt of the Dairy Stabilization Board to assess the sales of dairy products by Dairy Fresh is also illegal under the analysis of the Court in *American Oil Co. v. Neill*, 380 U.S. 451, 85 S.Ct. 1130 (1965). In *American Oil*, the State of Idaho attempted to impose a tax on gasoline sales made in Utah to a purchaser for importation into Idaho. The Utah dealer had other contacts with Idaho and was even a licensed dealer in Idaho. Nevertheless, the Court held that the imposition of taxes on the sales would violate the due process clause. The Court found it unimportant that the dealer knew its products would be imported into Idaho by the purchaser. It stated:

> The mere fact that Utah Oil knew that the gasoline was to be imported into Idaho merits little discussion. More than once this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be insufficiently related to activities within the taxing State, despite the fact that the vendor knew that the goods were destined for use in that State. (Citations omitted). *Id.* at 457, 85 S.Ct. at 1134.

Thus, where sales are consummated in another state, they may not be subjected to a duty by the importing state.

The invalidity of the attempt to impose an extraterritorial assessment is compounded by the fact that this action, if approved, would subject Dairy Fresh to the risk of multiple taxation. If Mississippi were to enact an assessment based on the processing or sale of dairy products within Mississippi, Dairy Fresh would be subject to assessment both by Mississippi and by Louisiana, while Louisiana processors would be assessed only once. This *possibility* of multiple levies is sufficient to invalidate the out-of-state assessment. This rule was discussed by the Court in *Central Railroad Co. v. Commonwealth of Pennsylvania*, 370 U.S. 607, 82 S.Ct. 1297 (1962), where a property tax was upheld as to some property but nullified as to other property. The Court said:

> Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction . . . (Emphasis by the Court). *Id.* at 614, 82 S.Ct. at 1303.

In addition to the authorities establishing that the Dairy Stabilization Board may not project its regulatory authority to another state, at least two cases decided by this Court hold that a company may not even be required to obtain a license to do business from a state unless it engages in conduct in that jurisdiction of a purely intrastate character. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 81 S.Ct. 1316 (1961); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 95 S.Ct. 260 (1974).

In *Eli Lilly*, the Court held that a license to do business could be required of a company that engaged in purely intrastate activity in New Jersey. Eighteen salesmen operating out of an Eli Lilly office in New Jersey regularly promoting the sales of its products. *Id.* at 280-81, 81 S.Ct. at 1319. These sales were described by the Court as "intrastate sales." *Id.* However, the Court stated that it is "settled" that a certificate to do business cannot be required if the sales are interstate sales, even if salesmen are sent into the state to promote this business. The Court said:

> It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers. Under the authority of the so-called "drummer" cases, such as Robbins v. Shelby County Taxing Dis-

> trict Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State . . . *Id.* at 278-79, 81 S.Ct. at 1318.

In *Allenberg*, the Court ruled that a cotton merchant could not be denied access to the courts of Mississippi for its failure to obtain a certificate to do business in the state. The merchant had contracted for the purchase of Mississippi cotton that would be delivered in Mississippi and later shipped in interstate commerce. The Mississippi Supreme Court ruled that the merchant could be denied access to the courts for its failure to obtain a certificate, because its business dealings were purely intrastate in nature. This Court reversed, holding that the purchase of the cotton was "in the stream of interstate commerce." *Id.* at 30, 95 S.Ct. at 266. In holding that a certificate to do business could not be required, the Court said:

> In short, appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a state seeks to require a foreign corporation to do business. *Id.* at 33, 95 S.Ct. at 267.

Dairy Fresh does not engage in any purely intrastate business in Louisiana. To the extent that Dairy Fresh has contacts with the state, these contacts are inter-

state in nature. Therefore, under the authority of *Eli Lilly* and *Allenberg*, Dairy Fresh cannot even be required to obtain a license from the Dairy Stabilization Board.

The sales of dairy products to Schwegmann and Delchamps occur entirely in the State of Mississippi. The Dairy Stabilization Board may not constitutionally impose a duty on the importation of these dairy products, nor may it project regulatory authority into another jurisdiction. Therefore, the decision of the court of appeals is correct.

B. The Dairy Stabilization Board Has Not Raised Any Arguments That Would Justify Additional Consideration Of The Appeal.

The Dairy Stabilization Board fails to raise any contention that would remove this case from the scope of the controlling precedents or justify additional consideration of the appeal. It argues: (1) the out-of-state projection of the assessment and regulations can be justified because the Dairy Stabilization Board is an "antitrust" enforcement agency; (2) the court of appeals improperly applied a "*per se*" test by holding that the assessment and regulations discriminate against interstate commerce; and (3) the decision of the court of appeals is unduly broad. Jurisdictional Statement at 13-24, 10-13, 24-27. None of these contentions has merit.

First, the self-proclaimed role of the Dairy Stabilization Board as an "antitrust" enforcement agency is inaccurate. This agency was created not to promote open competition, but to enforce an "effective program of regulation for the Louisiana dairy industry . . . " La. R.S. 40:931.1(17). The regulations promulgated by the Dairy Stabilization Board are designed primarily to limit competition, including price competition, among dairy processors. If implemented by an agreement among private competitors, rather than a state agency made up primarily of private competitors, the discount-fixing, credit-fixing and delivery-fixing provisions would probably be *per se* violations of the antitrust laws. *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377 (1927); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793 (1948); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925 (1980). Thus, the Dairy Stabilization Board does not serve any "antitrust" function.

Even if the function of the Dairy Stabilization Board could be characterized as serving an antitrust purpose, the projection of the agency's regulations to out-of-state transactions is still not justified. Louisiana has no power to assess or establish the terms of transactions occurring in Mississippi, even if its purpose is laudable. The Dairy Stabilization Board has cited no authority to support the assertion of this extrajurisdictional power. Thus, the decision of the court of appeals is correct.

Second, the decision of the court of appeals does not exclusively rely on an application of a *per se* test or a holding that the regulations of the Dairy Stabilization Board discriminate against interstate commerce. The primary holding of the Fifth Circuit is that "the application of the Louisiana Dairy Stabilization Law and regulations to these out-of-state processors based on the out-of-state sale of their products for resale in Louisiana violates the Commerce Clause . . ." 631 F.2d at 69. This holding that Louisiana cannot project its regulatory power out of state was based on the *Baldwin* and *Schwegmann* decisions reviewed in Section A of this brief. *Id.* The court of appeals did not inflexibly apply a *per se* test, but simply noted the recent holding of this Court that barriers to interstate commerce erected to promote economic protectionism ordinarily are subject to a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 620, 98 S.Ct. 2531, 2535 (1978).

Nor can the Dairy Stabilization Board claim that the attempted out-of-state application of its regulations is not economic protectionism. The attempt to impose the assessment is designed to eliminate an advantage now held by the out-of-state processor. Dairy Fresh produces milk in an unregulated jurisdiction where no assessment is imposed. Thus, as the Dairy Stabilization Board told the Fifth Circuit, the application of the assessment is designed to eliminate the "free ride"

otherwise available to the "out-of-state processor." (R., Original Brief for Appellant, Louisiana Dairy Stabilization Board at 38.) Moreover, the application of the other regulations of the Dairy Stabilization Board to the out-of-state transactions would eliminate delivery and pricing methods that have produced competitive prices. Thus, the only purpose of applying the regulations outside the state is to protect local economic interests.

Third, the decision of the court of appeals is not overly broad. The ruling does not invalidate "an entire statutory and administrative program on the basis of a single provision," but instead simply prohibits the Dairy Stabilization Board from regulating transactions in another jurisdiction. (Jurisdictional Statement at 9.) The Dairy Stabilization Law, as written, is still intact. Therefore, this contention of the Dairy Stabilization Board should be rejected.

CONCLUSION

The transactions between Dairy Fresh and Schwegmann and Delchamps occur entirely outside of Louisiana. The Dairy Stabilization Board has no authority to project its regulatory power into another state and impose assessments on these sales. No valid ground has been raised for further consideration of this appeal. Therefore, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that three copies of the foregoing brief have been mailed, postage prepaid, to counsel for the Louisiana Dairy Stabilization Board, Vernon V. Palmer, 7031 Freret Street, New Orleans, Louisiana 70118, M. David Gelfand, 125 Lake Street, No. 12 H-S, White Plains, New York 10603, and C. James Gelpi, Esq., 1007 Maritime Bldg., New Orleans, Louisiana 70130, this ____ day of July, 1981.

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